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No. 16530

VOL 3114

United States
Court of Appeals
for the Ninth Circuit

B. A. WILLIAMS, II,

Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii

FILED

NOV 2 - 1959

PAUL P. O'BRIEN, CLERK

No. 16530

United States
Court of Appeals
for the Ninth Circuit

B. A. WILLIAMS, II, Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

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for the District of Hawaii

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For the Appellant: B. A. Williams II, also known
as Byron A. Williams II,

FRANCIS P. O'NEILL,
Suite 1415, 1700 Broadway,
Denver 2, Colorado,

IRVING P. ANDREWS,
Suite 203, American Woodmen Annex,
Denver 5, Colorado.

For the Appellee United States of America:

LOUIS B. BLISSARD,
United States Attorney,

DARAL G. CONKLIN,
Assistant United States Attorney,
P. O. Box 654,
Honolulu, Hawaii.

District Court of the United States
for the District of Hawaii

Cr. No. 11,312

UNITED STATES OF AMERICA

vs.

B. A. WILLIAMS II, also known as BYRON A.
WILLIAMS II

WAIVER OF INDICTMENT

B. A. Williams, also known as Byron A. Williams II, the above named defendant, who is accused of violating 18 USC § 1341, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

/s/ B. A. WILLIAMS,
/s/ BYRON A. WILLIAMS,
Defendant.

/s/ FRANCIS P. O'NEILL,
Counsel for Defendant.

[Title of District Court and Cause.]

INFORMATION

Count I

The United States Attorney Charges:

That on or about April 25, 1958, in the District of Hawaii, and within the jurisdiction of this Court, B. A. Williams II, also known as Byron A. Williams II, having devised a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses and representations, to wit: a check kiting scheme involving the United States National Bank, Denver, Seattle-First National Bank, Seattle, and the Bank of Hawaii, Honolulu—for the purpose of executing such scheme and artifice caused to be placed in a post office and authorized depository for mail matter two checks drawn on the Petroleum Corporation of America's account in the said Seattle-First National Bank in the amounts of \$28,000.00 and \$16,000.00, at a time when the balance there was \$2,196.85, such checks being deposited to the personal account of Defendant at said Bank of Hawaii, and thereafter sent and delivered by the Post Office Department to said Seattle-First National Bank, the named drawee, for clearance and collection. 18 USC § 1341.

Count II

The United States Attorney Further Charges:

That on or about April 30, 1958, in the District of Hawaii, and within the jurisdiction of this

Court, B. A. Williams II, also known as Byron A. Williams II, the identical person named in Count I of this Information, having devised a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses and representations, to wit: a check kiting scheme involving the United States National Bank, Denver, Seattle-First National Bank, Seattle, and the Bank of Hawaii, Honolulu—for the purpose of executing such scheme and artifice caused to be placed in a post office and authorized depositary for mail matter two checks drawn on the account of the Petroleum Corporation of America in the said Bank of Hawaii in the amounts of \$27,000.00 and \$18,000.00, at a time when the balance there was \$10.65, such checks being deposited to the account of said corporation at said Seattle-First National Bank, and thereafter sent and delivered by the Post Office Department to said Bank of Hawaii, the named drawee, for clearance and collection. 18 USC § 1341.

Count III

The United States Attorney Further Charges:

That on or about May 2, 1958, in the District of Hawaii, and within the jurisdiction of this Court, B. A. Williams II, also known as Byron A. Williams II, the identical person named in Counts I and II of this Information, having devised a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses and representations, to wit: a check kiting scheme involving the United States National Bank, Denver, Seat-

tle-First National Bank, Seattle, and the Bank of Hawaii, Honolulu—for the purpose of executing such scheme and artifice caused to be placed in a post office and authorized depository for mail matter two checks drawn on the Petroleum Corporation of America's account in the said Seattle-First National Bank in the amounts of \$28,000.00 and \$17,500.00, at a time when the balance there was \$7,067.19, such checks being deposited to the account of said corporation at said Bank of Hawaii, and thereafter sent and delivered by the Post Office Department to said Seattle-First National Bank, the named drawee, for clearance and collection. 18 USC § 1341.

Count IV

The United States Attorney Further Charges:

That on or about May 6, 1958, in the District of Hawaii, and within the jurisdiction of this Court, B. A. Williams II, also known as Byron A. Williams II, the identical person named in Counts I, II, and III of this information, having devised a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses and representations, to wit: a check kiting scheme involving the United States National Bank, Denver, Seattle-First National Bank, Seattle, and the Bank of Hawaii, Honolulu—for the purpose of executing such scheme and artifice caused to be placed in a post office and authorized depository for mail matter three checks drawn on the commercial account of the Petroleum Corporation of America in the said Bank of Hawaii in the amounts of \$25,-

000.00, \$15,000.00, and \$6,200.00, at a time when the balance there was \$510.65, such checks being deposited to the account of said corporation at said Seattle-First National Bank, and thereafter sent and delivered by the Post Office Department to said Bank of Hawaii, the named drawee, for clearance and collection. 18 USC § 1341.

Count V

The United States Attorney Further Charges:

That on or about May 8, 1958, in the District of Hawaii, and within the jurisdiction of this Court, B. A. Williams II, also known as Byron A. Williams II, the identical person named in Counts I, II, III, and IV of this Information, having devised a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses and representations, to wit: a check kiting scheme involving the United States National Bank, Denver, Seattle-First National Bank, Seattle, and the Bank of Hawaii, Honolulu—for the purpose of executing such scheme and artifice caused to be placed in a post office and authorized depository for mail matter two checks drawn on the Petroleum Corporation of America in the said Seattle-First National Bank, each in the amount of \$25,000.00, at a time when the balance there was \$4,997.78, more or less, such checks being deposited to the account of said corporation at said Bank of Hawaii, and thereafter sent and delivered by the Post Office Department to said Seattle-First National Bank, the named drawee, for clearance and collection. 18 USC § 1341.

Count VI

The United States Attorney Further Charges:

That on or about May 14, 1958, in the District of Hawaii, and within the jurisdiction of this Court, B. A. Williams II, also known as Byron A. Williams II, the identical person named in Counts I, II, III, IV, and V of this Information, having devised a scheme and artifice to defraud and for obtaining money by means of false and fraudulent pretenses and representations, to wit: a check kiting scheme involving the United States National Bank, Denver, Seattle-First National Bank, Seattle, and the Bank of Hawaii, Honolulu—for the purpose of executing such scheme and artifice caused to be placed in a post office and authorized depository for mail matter two checks drawn on the personal account of Defendant in the said United States National Bank in the amounts of \$1,000.00 and \$50,000.00, at a time when the balance there was \$7.82, more or less, such checks being deposited to the account of said corporation at said Bank of Hawaii, and thereafter sent and delivered by the Post Office Department to said United States National Bank, the named drawee, for clearance and collection. 18 USC § 1341.

Dated: February 2, 1959, at Honolulu, Hawaii.

LOUIS B. BLISSARD,

United States Attorney,

District of Hawaii,

/s/ By DARAL G. CONKLIN,

Asst. United States Attorney.

[Endorsed]: Filed February 2, 1959.

[Title of District Court and Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled cause, do hereby find the defendant, B. A. Williams II, also known as Byron A. Williams II,

As to Count I: Guilty;

As to Count II: Guilty;

As to Count III: Guilty;

As to Count IV: Guilty;

As to Count V: Guilty;

As to Count VI: Guilty;

as charged in the Information herein.

Dated: Honolulu, T. H., this 3rd day of February, 1959.

/s/ JOHN S. HOFFMAN,
Foreman.

[Endorsed]: Filed February 3, 1959.

[Title of District Court and Cause.]

MOTION TO SET ASIDE THE VERDICT OF
THE JURY, OR IN THE ALTERNATIVE,
FOR A NEW TRIAL

Comes Now the defendant above named, by and through his attorney, and hereby respectfully requests this Court to enter an order setting aside the verdict of the jury heretofore entered, or in the alternative, to grant to he defendant a new trial.

As grounds for this motion, the defendant states and shows unto the Court:

1. That the Court erred as a matter of law in not entering a judgment of dismissal at the conclusion of the Government's evidence, and again at the conclusion of all of the evidence.

2. That the verdict is not support by substantial evidence, nor were all of the material allegations of the information proven as a matter of law.

3. That no scheme or fraudulent scheme was shown by the evidence as set forth in all six counts of the information, and that the Government did not by any evidence prove each and every material allegation of the information, to-wit: that three banks, as alleged in the information, were involved in the fraudulent scheme of the defendant.

Wherefore, defendant prays that this Court enter an order setting aside the verdict of the jury, or in the alternative, grant to the defendant a new trial.

/s/ FRANCIS P. O'NEILL,
Attorney for Defendant.

[Endorsed]: Filed February 16, 1959.

[Title of District Court and Cause.]

MOTION TO DISMISS INFORMATION

The Defendant moves that the information be dismissed on the following grounds:

1. The information does not allege sufficient facts to constitute an offense against the United States.

2. That the Information filed herein omits one of the essential elements of the offense sought to be charged and is therefore fatally defective as a matter of law.

Wherefore, Defendant moves that information heretofore filed herein be dismissed.

Respectfully submitted,

/s/ IRVING P. ANDREWS,
Attorney for Defendant.

[Endorsed]: Filed April 1, 1959.

District Court of the United States
For The District of Hawaii

No. 11,312

UNITED STATES OF AMERICA,

vs.

B. A. WILLIAMS II, also known as BYRON A.
WILLIAMS II.

JUDGMENT AND COMMITMENT

On this 3rd day of April, 1959, came the attorney for the government and the defendant appeared in person and by counsel, Irving P. Andrews, Esquire.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of having devised a scheme

and artifice to defraud and for obtaining money by means of false and fraudulent pretenses and representations, to wit: a check kiting scheme involving the U. S. National Bank, Denver; Seattle-First National Bank, Seattle; and Bank of Hawaii, Honolulu; for the purpose of executing such scheme and artifice caused to be placed in a post office and authorized depository for mail matter various checks drawn on the Petroleum Corp. of America's account or on the personal account of defendant, in the aforesaid banks in the amount of \$1,000 to \$50,000 at a time when the balance therein was \$7.82, more or less, such checks being deposited to the account of said corporation and thereafter sent and delivered by the P. O. Dept. for clearance and collection, in violation of § 1341, 18 USC, as charged in Counts I-VI; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Six Months, and Fined One Thousand Dollars (\$1,000.00) as to each of Counts I, II, III, IV and V (a total of \$5,000.00). The sentences of imprisonment shall be concurrent with each other, and the execution thereof is suspended and the defendant is placed on probation for a period of Five

Years for this date as to each of Counts I through V. As to Count VI, imposition of sentence is hereby suspended and the defendant is placed on probation for a period of Five Years from this date. The periods of probation as to each count shall run concurrently with each other.

The fines shall be paid within Ninety (90) Days from this date; otherwise the defendant shall stand committed until payment of the fines.

Jurisdiction of this case and supervision of probation will be transferred to the United States District Court for the District of Colorado.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ JON WIIG,
United States District Judge.

/s/ WM. F. THOMPSON, JR.,
Clerk.

[Title of District Court and Cause.]

NOTICE OF APPEAL

B. A. Williams, II, also known as Byron A. Williams II, 330 Petroleum Club Building, Denver 2, Colorado, appellant.

Francis P. O'Neill, 330 Petroleum Club Building, Denver 2, Colorado, and Irving P. Andrews, Suite 203, American Woodmen Annex, Denver 5, Colorado, attorneys for appellant.

Offense: Mail Fraud (18 USC § 1341).

Sentenced April 3, 1959, Counts One (1) through Five (5) fine of \$1,000.00 on each of said counts and six (6) months on each of said counts to be served concurrently; imposition of the periods of confinement of each of said counts suspended and defendant placed on probation for a period of five (5) years. Fine of \$5,000.00 to be paid within ninety (90) days from date of sentence.

Count Six (6) Court suspended imposition of sentence and placed defendant on probation for a period of five (5) years to be served concurrently with probation granted on counts one (1) through five (5). Supervision and jurisdiction of defendant transferred to the District of Colorado.

I, B. A. Williams II, also known as Byron A. Williams II, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated at Denver, Colorado this 8th day of April, A.D., 1959.

/s/ B. A. WILLIAMS II,
Appellant.

[Endorsed]: Filed April 10, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 229 consists of a statement of the names and addresses of the attorneys of record and of the various pleadings, exhibits, and transcript of proceedings as hereinbelow listed and indicated:

Originals:

Waiver of Indictment.

Information.

Verdict.

Motion to Set Aside the Verdict of the Jury, or
in the Alternative, for a New Trial.

Motion to Dismiss Information.

Judgment and Commitment.

Notice of Appeal.

Designation of Record.

Counter-Designation of Record on Appeal.

Order Extending Time for Filing Record and
Docketing Appeal.

Motion for Extension of Time.

Affidavit.

Order.

Exhibits:

Plaintiff's Nos. 1 through 28, 29-A through 29-D, 30, 31-A through 31-C, 32-A through 32-D, 33, and 34, and Defendant's "A" (in separate envelope).

Transcript of Proceedings.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 7th day of July, 1959.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk.

In The United States District Court
For The District of Hawaii

Criminal No. 11,312

UNITED STATES OF AMERICA,
Plaintiff,
vs.

B. A. WILLIAMS II, also known as BYRON A.
WILLIAMS II, Defendant.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S. District Court, Honolulu, T. H., commencing on February 2, 1959.

Before: Hon. Jon Wiig, Judge, and a jury.

Appearances: Daral G. Conklin, Esq., Assistant

U. S. Attorney, appearing for the Plaintiff. Francis P. O'Neill, Esq., appearing for the Defendant. [1]*

* * * * *

Mr. Conklin: Ladies and gentlemen of the jury, our opening statement is very short and it is very simple. It relates to what the government expects to prove, of course. The government expects to prove that during the months of April and May, 1958, part of April and part of May, the Defendant B. A. Williams II engaged in what is commonly known as check-kiting scheme from the three banks which you heard the Court mention. The government expects to prove that Mr. Williams made deposits to his personal account in the Bank of Hawaii of checks drawn on his Seattle Corporate Company about April 25th. Thereafter, about April 30th, he made deposits in his Seattle account of checks drawn on the Bank of Hawaii. Thereafter, he made deposits in the Bank of Hawaii of checks drawn on his Seattle account. Thereafter, checks deposited in the Seattle account were drawn on the Bank of Hawaii. Thereafter deposited in the Bank of Hawaii [10] checks drawn on the Denver Bank. The government expects to prove that.

The government expects to prove that at all times mentioned, starting on or about April 25 and continuing through May 14, 1958, the amount of all the checks was greatly in excess of any and all bank balances mentioned and held by the Defendant in any and all of those banks.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

The government further expects to prove that the Defendant did this knowingly and with an intent to devise a scheme.

The government further expects to prove that the United States Mails were used for carrying out of this scheme and that the Defendant knew and intended that the United States Mails would be used.

Thank you.

The Court: Mr. O'Neill, do you wish to make an opening statement at this time?

Mr. O'Neill: We would like to reserve that, your Honor.

The Court: Very well. We will take a recess before you call your first witness.

Ladies and gentlemen of the jury, you are excused for a 10-minute recess. The Court will stand at recess.

(A recess was taken.) [11]

After Recess

The Court: The record will show that the jury is present, the Defendant and his counsel. Will you call your first witness?

Mr. Conklin: The government calls Dominick Ranieri.

DOMINICK S. RANIERI

a witness called by the Plaintiff, being duly sworn,
testified as follows:

Direct Examination

Q. (By Mr. Conklin): Would you state your name, please, sir?

A. My name is Dominick S. Ranieri, R-a-n-i-e-r-i, D-o-m-i-n-i-c-k.

Q. And where do you live, Mr. Ranieri?

A. 2120 Kapiolani Boulevard.

Q. That is here in Honolulu?

A. That's right.

Q. Are you acquainted with Mr. B. A. Williams II?

A. Yes, sir, I am.

Q. And do you see him here in Court today?

A. I do.

Q. Would you point him out, please?

A. Yes, the gentleman in the dark suit.

The Court: The record will show that the witness has identified the Defendant.

Q. (By Mr. Conklin): Mr. Ranieri, when did you first [12] become acquainted with Mr. Williams?

A. I first met him, I believe, the exact date was November 30, 1956.

Q. 1956? And what was your relationship with Mr. Williams? Did you see him from time to time or just met him once or what?

A. Well, I met him at that time because he was with my former wife's nephew, the wife to whom I was married at that time was his aunt. And he

(Testimony of Dominick S. Ranieri.)

came here on a trip and telephoned here and, of course, I went down to visit and said hello. And I was introduced to him. We spent some time together for a few days and he explained what his business was. He was in the oil business, as his father had been before him. And at that time, at the time I had no employment, and I was thinking about maybe going back to the mainland. And the way he explained the way the business was set up, drilling for oil, it sounded very interesting to me, with the result that I talked with a few of my friends in town and introduced him and explained the nature of the operation and wondered whether they would be interested.

So because of that, why, we went into business here in Honolulu. I believe it was December 3rd, the exact date that Mr. Williams decided to open an office here, and would I want to stay on and work with him as a resident manager.

Q. As what? I'm sorry. [13]

A. As a resident manager. So I talked over, I talked it over with my wife at the time. Well, she thought it sounded like a pretty good idea, so I went ahead on that basis and started to set up the office. Do you want me to go on?

Q. No. My next question would be this: You say resident manager of the business. What business are you referring to?

A. Well, it was the business of selling interests, in what they call working interest in the drilling of oil wells, which is similar to a joint venture op-

(Testimony of Dominick S. Ranieri.)

eration, where people buy in for a certain percentage, for so many dollars, and participate in the venture of drilling for oil.

Q. And were these people who were investing doing the oil drilling? A. Pardon?

Q. You say it was for the purpose of getting people to invest in oil drilling? A. Yes.

Q. Well, were these people who were investing, were they doing the oil drilling?

A. Oh, no, they were investors and, of course, the drilling was done wherever the lease happened to be on the mainland of the United States, done by a drilling contractor.

Q. And when you say drilling contractor, whom do [14] you refer to?

A. Well, a drilling contractor that would be contracted by Mr. Williams, and later on by the Petroleum Corporation of America.

Q. Now, calling your attention, Mr. Ranieri, to April and May of 1958, were you acting as such resident manager for Mr. Williams at that time?

A. Yes, sir, for Mr. Williams, I guess, and/or Petroleum Corporation of America which he had formed subsequently.

Q. Now, in April of 1958, were your duties the same as you have previously recited your duties to be when you first started?

A. Yes, essentially the same, the same way right through.

Q. And in April of 1958, were you responsible

(Testimony of Dominick S. Ranieri.)

for any deposits made to checking accounts here in the Territory?

A. I don't understand how you mean that responsible, sir.

Q. Well, let me rephrase that. Did the Petroleum Corporation of America have any accounts in local Territorial Banks in April, 1958?

A. Yes, sir. There was an account in the name of the Petroleum Corporation of America at the Bank of Hawaii Main Branch, Main Office. [15]

Q. And in April of 1958, did B. A. Williams II have any checking accounts in banks in the Territory of Hawaii?

A. Yes, sir, he had a personal—it was in his name, in the name of B. A. Williams II, at the Bank of Hawaii.

Q. And you personally, did you personally have any activity with regard to those accounts, that is, the corporation account and the personal account?

A. Well, yes, sir. As checks would come in, people investing in the ventures, I would by instructions from Mr. Williams make deposits—well, I had no authority to withdraw—I just made the deposits as they came in. I would advise him when he was away from here how much was deposited on a certain date.

Q. Do you know who had the authority to draw against those accounts?

A. The only one so far as I know was Mr. B. A. Williams.

Q. Now, in April 1958 did you deposit any

(Testimony of Dominick S. Ranieri.)

checks in Mr. B. A. Williams II account drawn by Mr. B. A. Williams II?

A. I am pretty sure I did. As I recall, I believe it was April. Whether it was in his personal account or the Petroleum Corporation Account, I am a little hazy. I have all of that in a statement.

Q. What's that? [16]

A. I have all that information in a statement which I made to the postal inspector right at that particular time. And I have to refresh my memory as to dates and which accounts the checks were deposited in.

Q. Well, at the time you made that statement—you are referring to an affidavit which I have in my possession, is that correct? A. Yes, sir.

Q. And at the time you made that affidavit, were you then familiar with the dates and the various transactions? A. Yes, sir, I was.

Q. And you are now asking to see that affidavit in order to answer the question?

A. It would help me, yes, sir.

Mr. O'Neill: Your Honor, I think the questions he is asking are leading and suggestive. And the witness made a statement that there are documents which would refresh his recollection, without going into a statement. I don't think it is proper at all at this time.

The Court: Are there any documents or records, books or deposit slips?

Mr. Conklin: They will be offered, your Honor, with regard to evidence, both the deposits, and so

(Testimony of Dominick S. Ranieri.)

forth, they will be shown both through this witness and through other witnesses. [17]

The Court: Well, let's get at the records if they are available, rather than have him make reference to a statement that he made, if you are going to offer those. Perhaps they will refresh the witness' recollection.

Mr. Conklin: Well, may counsel approach the bench, your Honor?

The Court: For what purpose?

Mr. Conklin: Well, certain checks that were deposited are not in our possession because they were in due course of the bank business returned to the depositor. Now, certain checks we do have. Certain other checks we do not have because they have been returned to the Defendant.

The Court: Well, aren't there officers or agents of the bank who can testify from their records as to the dates and amounts?

Mr. Conklin: Yes, your Honor. What we are getting at here is the fact of deposits made by the Defendant's agent.

The Court: Well, I think you are getting at that. (To the witness) You made these deposits for Mr. Williams or for the corporation in the Bank of Hawaii Main Branch during the months of April and May of 1958, is that correct?

The Witness: Yes, sir, I made deposits. That is, I had before. [18]

Q. (By Mr. Conklin): Why were those deposits

(Testimony of Dominick S. Ranieri.)

made in the various accounts in April and May of 1958?

A. On instructions by Mr. Williams to make such deposits.

(Mr. Conklin shows a document to Mr. O'Neill.)

The Court: Do you have all of those records there or photostatic copies?

Mr. Conklin: Yes, your Honor.

The Court: Why not show the whole bunch of them to Mr. O'Neill so he may examine them? He may have no objection to them going into evidence.

(Mr. Conklin hands some documents to Mr. O'Neill.)

Mr. O'Neill: As to the form of the exhibits being photostats, some originals and some photostats, we have no objection to those when properly identified.

The Court: Well, what I was trying to get at, is there a possibility of doing it the short way? First, you have no objection to the fact that some of them are photostatic copies?

Mr. O'Neill: No, your Honor.

The Court: Perhaps the witness can identify them. I don't know.

Q. (By Mr. Conklin): Mr. Ranieri, are you familiar with the signature of Mr. B. A. Williams II?

A. Yes, sir, I am. [19]

Q. I show you a printed card from the Bank of Hawaii bearing a corporate resolution of authority on one side——

Mr. O'Neill: One moment. We object to any ref-

(Testimony of Dominick S. Ranieri.)

erence to a printed card unless it is going to be marked and used and properly identified. As I understand it, he asked for his signature, if he was familiar with the signature of Mr. B. A. Williams. And now there is some reference to a corporate resolution or something which appears on a piece of paper which he has. I don't think it is proper until it has been properly marked and identified.

The Court: Well, that is what I was trying to get at, Mr. O'Neill. First, you recognize the signature B. A. Williams II?

Mr. Conklin: He does know it, yes.

The Court: Are you going to offer it in evidence?

Mr. Conklin: After I have him identify it.

The Court: Well have him identify it.

Q. (By Mr. Conklin): I ask you whether the signature of B. A. Williams appears on that card? (Handing a card to the witness.)

A. Yes, sir, it does.

Mr. Conklin: Very well, we will offer that card in evidence.

Mr. O'Neill: Your Honor, maybe I am not familiar [20] with the procedure. Is there a number?

The Court: Well, there would be a number. I dislike the practice of marking a document for identification and then having to renumber it when received in evidence, unless there is some objection. That is the only point.

Mr. O'Neill: I wasn't sure how I could keep track of them.

(Testimony of Dominick S. Ranieri.)

The Court: You are offering that as exhibit 1?

Mr. Conklin: Yes, sir.

Mr. O'Neill: We have no objection, then.

The Court: Very well. Proceed. Our procedure here is the same as it is in Denver, I am sure, Mr. O'Neill.

(The document referred to was received in evidence as Plaintiff's exhibit number 1.)

Q. (By Mr. Conklin): I show you another card, Mr. Ranieri, and ask you does Mr. B. A. Williams II signature appear on that card? (Showing a card to the witness.)

A. It looks like Mr. Williams' signature.

Q. Well, do you feel that it could be not his signature?

A. It is a little larger than that one. That is his signature.

Mr. Conklin: Very well. We would offer this card in evidence.

The Court: What type of card is that? [21]

Mr. Conklin: This is an individual checking account card.

The Court: Signature card?

Mr. Conklin: Yes, your Honor.

The Court: There being no objection, that will be received as exhibit number 2.

(The card referred to was received in evidence as Plaintiff's exhibit number 2.)

Q. (By Mr. Conklin): Mr. Ranieri, I hand you a photostat of a Bank of Hawaii deposit slip and ask you is that a copy of the deposit slip made out

(Testimony of Dominick S. Ranieri.)

by you for deposit to the account name on May 2nd, 1958? (Handing a document to the witness.)

A. Yes, it is.

Mr. Conklin: Your Honor, we offer this in evidence to be exhibit 3.

The Court: There being no objection, it will be received as exhibit 3.

(The document referred to was received in evidence as Plaintiff's exhibit No. 3.)

Q. (By Mr. Conklin): Mr. Ranieri, I show you another photostat of another Bank of Hawaii deposit slip showing a deposit to the account of the named account on the slip, dated May 7th, and ask you, is that a copy of the deposit slip you made out at that time? (Handing document to the [22] witness.)

A. Yes, sir, it is.

Mr. Conklin: We offer this as exhibit 4.

The Court: There being no objection, it will be received as exhibit 4.

(The document referred to was received in evidence as Plaintiff's exhibit No. 4.)

Q. (By Mr. Conklin): Mr. Ranieri, I show you a check drawn on the Seattle First National Bank naming the Petroleum Corporation of America as maker. Does Mr. B. A. Williams' signature appear on that? (Handing a document to the witness.)

A. Yes, sir.

Q. And did you cause this check to be deposited in the Bank of Hawaii as shown by the deposit indicated on Plaintiff's exhibit 4?

A. Yes, sir.

(Testimony of Dominick S. Ranieri.)

Q. That is the check that is indicated on this deposit slip, is that correct? A. Yes, sir.

Mr. Conklin: Your Honor, we offer this check as exhibit 5.

The Court: What is the date of the check?

The Clerk: May 5, 1958.

The Court: There being no objection, it will [23] be received as exhibit number 5.

Mr. O'Neill: What is the amount of that?

The Clerk: \$25,003. It is \$25,000.

Mr. Conklin: A protest fee of \$3.

(The document referred to was received in evidence as Plaintiff's exhibit number 5.)

Q. (By Mr. Conklin): Mr. Ranieri, I show you a photostat of a Bank of Hawaii deposit slip dated May 8th, 1958, showing a deposit to the Petroleum Corporation of America, and I ask you is that a copy of the deposit slip that you presented on that date? (Handing a document to the witness.)

A. Yes, sir, it is.

Mr. Conklin: Your Honor, we offer this as exhibit 6.

Mr. O'Neill: May I see that, please? (Document handed to Mr. O'Neill.)

The Court: There being no objection, it will be received as exhibit 6.

(The document referred to was received in evidence as Plaintiff's exhibit No. 6.)

Q. (By Mr. Conklin): Mr. Ranieri, referring to Plaintiff's exhibit 6, I hand you a check dated May 6th, 1958, drawn on the Seattle First National

(Testimony of Dominick S. Ranieri.)

Bank, Main Branch, and I ask you, is that the check you deposited as shown on [24] exhibit 6? (Handing a document to the witness.)

A. Yes, sir.

(Mr. Conklin shows document to Mr. O'Neill.)

The Court: There being no objection, the check will be received as exhibit number 7.

(The document referred to was received in evidence as Plaintiff's exhibit number 7.)

The Court: What are those yellow slips?

Mr. Conklin: Those are tabs put in by the drawee bank.

The Court: Those tabs are part of the exhibit? I believe there is one on exhibit number 5, too.

Q. (By Mr. Conklin): Showing you a Bank of Hawaii deposit slip, a photostat thereof, dated May 12, 1958, I ask you, is that a duplicate of the deposit slip you made out on that date for a deposit to the Petroleum Corporation of America in the Bank of Hawaii? (Handing a document to the witness.)

A. Yes, sir, it is.

Mr. Conklin: We offer this as exhibit 8.

The Court: There being no objection, it will be received as exhibit number 8.

(The document referred to was received in evidence as Plaintiff's exhibit number 8.)

Q. (By Mr. Conklin): Referring to exhibit number 8, [25] Mr. Ranieri, I hand you a check drawn on the U.S. National Bank of Denver, Colorado, dated May 12, 1958, and I ask you, is that the

(Testimony of Dominick S. Ranieri.)

check that was deposited as shown on exhibit number 8? (Handing a document to the witness.)

A. Yes, sir, it is.

Mr. Conklin: Your Honor, we offer this check, which is for \$1,000, as exhibit number 9.

The Court: It will be received as exhibit number 9.

(The document referred to was received in evidence as Plaintiff's exhibit No. 9.)

Q. (By Mr. Conklin): Mr. Ranieri, I show you the original of a Bank of Hawaii deposit slip dated May 14th, 1958, showing a deposit on that date to the account of Petroleum Corporation of America, and I ask you, is that the deposit slip you made out on that date? (Showing a document to the witness.)

A. Yes, sir, it is.

Mr. Conklin: Your Honor, we offer this as exhibit 10.

The Court: It will be received as exhibit number 10.

(The document referred to was received in evidence as Plaintiff's exhibit number 10.)

Q. (By Mr. Conklin): Mr. Ranieri, referring to [26] exhibit 10, I show you a check dated May 14th drawn on the U. S. National Bank, Denver, Colorado, and ask you, is that the check you deposited as shown on exhibit 10? (Showing a document to the witness.)

A. Yes, sir, it is.

Mr. Conklin: Your Honor, we offer this check which is dated May 14th and in the sum of \$50,000 as exhibit number 11.

(Testimony of Dominick S. Ranieri.)

The Court: There being no objection, it will be received as exhibit number 11.

(The document referred to was received in evidence as Plaintiff's exhibit number 11.)

Mr. Conklin: No further questions, your Honor.

The Court: Cross examination?

Cross Examination

Q. (By Mr. O'Neill): Mr. Ranieri, you were the office manager of Petroleum Corporation of America, is that correct? A. Yes, sir.

Q. Now, what was the usual procedure or the method of depositing money in the Bank of Hawaii?

A. Well, you mean the money that came in from the investors or any money at all?

Q. I can't hear you.

A. The money that was brought in by investors or [27] any money at all? Well, from time to time Mr. Williams would give me instructions as to which account to make a deposit to. I would proceed when he came in or checks came in to make deposits and I would advise him at times by letter, sending a list of deposits made on a certain date. Sometimes by telephone when he would call or I would call him. At other times by telegram where I would wire at the end of the day that I made so many deposits to a certain account, that I made so many dollars, so many deposits to a certain account that particular date.

Q. This was the normal course of business that

(Testimony of Dominick S. Ranieri.)

you would collect the money, you would make the deposits, and then advise the Denver office, is that correct? A. That's correct.

Q. And the Petroleum Corporation of America did have an account in Denver and maintained an office there, is that right? A. Yes, sir.

Q. Now, at the time that Mr. Williams instructed you to make these deposits or anything of that type, did he tell you anything else in regard to it? When you drew these checks on the Seattle Bank, these checks that were referred to here, I believe you were shown those checks by the United States Attorney, these checks from the Seattle Bank, and did then Mr. Williams say anything to you at the time? [28] A. Yes.

Q. Would you relate what that was, please?

A. Pardon?

Q. What did he tell you at the time?

A. He had started an operation in Seattle where he was selling interests, I believe, similar to what is set up here, to people there. And as the money would be deposited there by his—we had a manager up there—Mr. Dewey or something like that—I never did meet him——

Q. Would you speak up?

A. The procedure was the same as here, as my understanding. That is the reason why he would ask me to complete checks on the Seattle Bank for deposit here. And my understanding of the reason for that procedure, which made sense, was the fact that in business it is better if your competitors don't

(Testimony of Dominick S. Ranieri.)

know where you have your source of investment money. That is as I understand the reason for the checks being from the Seattle deposit bank.

Q. Mr. Williams did tell you at the time that you made these Bank of Hawaii deposits that interests had been sold and there was money in the Seattle bank, is that right? A. Yes, sir.

Q. And that he had been told by his manager up there that these interests had been sold?

A. Yes, sir. [29]

Q. And the money was being deposited by the Seattle man? A. Yes, sir.

Q. In other words, the same situation here, that if you would collect money you would deposit it here, is that right? A. That's right.

Q. And you would advise Mr. Williams in Denver or wherever he happened to be at the time?

A. Yes, sir.

Q. As to the amount of deposits?

A. Yes, sir.

Mr. O'Neill: That's all.

The Court: Redirect?

Redirect Examination

Q. (By Mr. Conklin): With regard to these various checks referred to on cross examination, Mr. Ranieri, and as you have previously identified either through deposit slips or the actual checks themselves, how did you receive those checks for deposit?

A. The checks that are there in evidence were

(Testimony of Dominick S. Ranieri.)

signed in blank by Mr. Williams and left with me here. And on his instructions by telephone I would complete one of those checks and in some cases have to alter a check, say, Bank [30] of Hawaii check, and type in First National Bank of Denver or whatever it was, and made deposit as per his instructions.

Mr. Conklin: No further questions, your Honor.

The Court: Recross, Mr. O'Neill?

Mr. O'Neill: We have no further questions.

The Court: You may step down, Mr. Ranieri.

(Witness excused.)

The Court: Call your next witness.

Mr. Conklin: Mr. C. R. Klenske.

CARL R. KLENKE

a witness called by the Plaintiff, being duly sworn,
testified as follows:

Direct Examination

Q. (By Mr. Conklin): Would you state your name, please, sir?

A. Carl R. Klenske, K-l-e-n-s-k-e.

Q. And where do you live, Mr. Klenske?

A. 1547 Ala Wai, Honolulu.

Q. And where are you employed?

A. Bank of Hawaii.

Q. And what is your position at the Bank of Hawaii?

A. Assistant Vice President in charge of operations of the head office.

(Testimony of Carl R. Klenske.)

Q. And how long have you been employed at the Bank of Hawaii? [31]

A. 11 years, approximately.

Q. And where had you been employed prior to that?

A. Security First National Bank in Los Angeles.

Q. And how long have you been employed there?

A. A year there.

Q. And where had you worked prior to that?

A. Prior to the war, the First National Bank in Philadelphia for approximately 10 years.

Q. So that your banking experience in three banks totals about 22 years?

A. Approximately.

Q. 10, 1 and 11? A. That's it.

Q. Mr. Klenske, do you know what the term kiting is?

Mr. O'Neill: Just a minute, your Honor. We object to that. There is no proper foundation that has been made for such a question as that, asking a witness to speculate on some definition which, if anything, is going to be a matter of law for the Court.

The Court: Objection sustained.

Q. (By Mr. Conklin): Mr. Klenske, can you describe your job at the Bank of Hawaii with regard to the word you used, "operations"?

A. Yes. The function of operations is to administer the systems, the methods, the personnel. In other words, [32] to run the bank in all phases of its activities except the actual making of loans, they

(Testimony of Carl R. Klenske.)

being two specialized fields. And in that capacity, I might add, that all matters in reference to book-keeping or customer accounts, loan records, control are my responsibility.

Q. Now, Mr. Klenske, are you familiar with the Bank of Hawaii requirements for the operating of corporate checking accounts? A. Yes, I am.

Q. And what is that procedure?

A. We first require a resolution. And a resolution means an extract from the minutes of the corporate board meeting reciting that the account should be opened in a designated bank; certified officers are authorized to sign and to designate the number of those officers, whether it be one or two. And, of course, most important then, money is deposited in an account and an account is then opened. Then this gives the corporate officers then the right to draw in accordance with the resolution against the funds on deposit.

Q. Showing you Plaintiff's exhibit number 1, Mr. Klenske,—and you will notice there is something on the other side—— A. Yes.

Q. —will you explain to the jury what that exhibit [33] is? (Handing document to the witness.)

A. This is a signature card for the Petroleum Corporation of America authorizing any one of three officers to sign. On the reverse under corporate seal is the resolution resolving that the account be opened at the Bank of Hawaii and resolving—this being an extract from the minutes of the board of directors meeting—resolving that until further

(Testimony of Carl R. Klenske.)

notice these instructions shall remain in full force and effect. And then certifying that this is a true extract.

Q. Now, Mr. Klenske, are you familiar with the Bank of Hawaii requirements for the opening of individual checking accounts? A. I am.

Q. And what is that requirement and procedure?

A. Well, that, of course, differs from the corporation set-up since that is an elective thing by an individual. The only signature requirement is that of identification. We must be certain that the individual who is opening an account is who they say they are. And, of course, again that they put on deposit money. That is, good funds on which they intend to draw checks.

Q. Showing you Plaintiff's exhibit number 2, Mr. Klenske, will you please explain what that exhibit is to the jury? (Handing document to the witness.)

A. This is an individual checking account signed [34] by Mr. B. A. Williams, showing an address of 360 Alexander Building, Alexander Young Building. And there are a series of notations to indicate the type of identification, by whom introduced, and so forth.

Q. And this signature card relates to what bank?

A. The Bank of Hawaii.

Q. Now, Mr. Klenske, are you familiar with Bank of Hawaii procedures with regard to checks drawn on banks outside of the Territory of Hawaii

(Testimony of Carl R. Klenske.)

but deposited in Bank of Hawaii accounts? Are you familiar with them? A. Yes, I am.

Q. Would you explain what that procedure is?

A. Well, at the time of deposit, when a deposit is received, it is sent through what we call our transit department for processing, which merely means for processing, which merely means that in order to check, in order to collect a check, you have got to send the check to the Bank on which it is drawn, the check being of absolutely no value until it is collected. We take checks in groups. We send these checks in the case of mainland items, which is what the attorney asks, to the mainland for collection. And when there are large sums involved, the banks because they frankly refuse a central bank to clear a lot of small items will send large checks direct to the bank on which it is drawn in order to speed up the time involved in getting it there. [35] Since obviously if you deposit a check today, it wouldn't get to the mainland for several days and be collected, and we here in Hawaii don't have the use of the money until it is collected. So it is floating. In practice, we, of course, when we send these checks to the mainland banks for collection, are advised that they were received and that we have payment or that they were paid or that they weren't paid and they will be returned to us. And that is the practice that is common to all banks, not just ours.

Q. And are you familiar with the procedure that is carried on within the Bank of Hawaii with regard to such out-of-town checks?

(Testimony of Carl R. Klenske.)

A. Yes, I am familiar with the practices.

Q. Very well. What I am getting at is this: When, as you have explained, a check drawn on an out-of-town bank, on a mainland bank, is deposited, it goes through your bank and is sent to either a clearing bank or the bank upon which it is drawn, depending on the size. That is correct so far?

A. Yes.

Q. Now, how is that check sent to the mainland?

A. You are referring to the mechanics of the thing?

Q. Yes.

A. Well, yes, we take all of these checks and send [36] them by mail. We have to get them grouped, accumulate totals, dispatch those to what we call our mail department. The mail department then uses one of two methods to send these out in the mail. Either they take them directly to the post-office or they sent it through an armored car. And, of course, they are sent airmail in the interest of time. And always, for that matter, are those checks sent by mail. There is no other way to get them there. We just don't send them any other way. They are the mechanics of the thing. Is that what you have in mind?

Q. Yes. Now, with regard to again the mechanics of the Bank of Hawaii, with regard to such out-of-town checks, are you familiar with any routine which may exist with regard to the receipt of those checks by such mainland banks? And if so, are you——

A. Oh, yes.

(Testimony of Carl R. Klenske.)

Q. And what is that?

A. Well, we are advised that they got there. And if they didn't, we wouldn't get paid. We wouldn't get our money. There's two ways that that comes to pass. We in the banking business expect everything to be predicated in the interests of time, that these accounts for these accumulated sums will be credited as soon as possible since there is the element of interest involved. So we have a system whereby we telegraph automatically if an item is not going to be paid. If it is over a specified sum, which is small— [37] so we get instantaneous advice as to non-payment and we are advised of the receipt through the credit to our account.

Q. Now, with regard to Bank of Hawaii procedures as to the checks, as to the account to which such out-of-town check is deposited, are you familiar with the procedure followed there?

A. Are you referring to the checks, specifically to the checks?

Q. No, just generally. For instance, you have explained what happens to a check drawn on an out-of-town bank when it comes to the Bank of Hawaii.

A. Yes.

Q. How it eventually gets to that bank?

A. Yes.

Q. Now, what I am interested in is what about the account in the Bank of Hawaii which deposited that check?

A. Well, it is necessary that all accounts be subject to scrutiny constantly, particularly those who

(Testimony of Carl R. Klenske.)

are drawing checks on mainland banks. And particularly if the amounts are large. This is what we call standard operating procedure. That is also true in the case of local banks. But with specific reference to the mainland items. There is more time involved in the clearance of mainland items than there is in the clearance of local items. [38] So whenever checks are in large amounts or the balances of those accounts are running large and rising and falling constantly, then we review these accounts to be certain that we are not paying funds against what we call in the banking business uncollected funds, which simply means not good.

Q. Now, with regard, as you say, with regard to the account balances rising and falling, how does such an account receive a balance?

A. Well, whenever these deposits in any account come in,—I think a classic example of that is an individual account—most people deposit their paycheck and by the end of the month they don't have very much left. This is something that I think we are all familiar with. In the case of a corporate balance, one expects a corporate balance to be maintained at a certain level. It shouldn't go below. And in the course of business when these checks are deposited, we know that it takes, for example, in Seattle or in San Francisco or Los Angeles—any West Coast major city—two days we figure, two days time before we can expect credit. And if there are a series of checks coming in to be paid against just that one deposit with no residue balance, noth-

(Testimony of Carl R. Klenske.)

ing over and above, then you have a situation of drawing against uncollected funds. And the bank has every right to refuse payment of those checks presented against that so-called uncollected deposit until we know it has been paid. [39]

Q. Now, with regard to the mechanics of deposit of such checks within the bank, what happens when the check is presented? Is it presented by itself or is there a deposit slip with it or what?

A. All deposits that are made in the bank, of course, are accompanied by the debits, the checks or cash, and what we call a deposit slip, which is the credit. The purpose, of course, of the ticket being to identify that particular deposit so that the individual gets credit to their account. It is the credit ticket that tells the bookkeeper to credit Johnson's account so much money. The items that supported that credit, as I have already indicated, are pulled away and sent on.

Q. In other words, so that the checks go in one direction to be forwarded,— A. Right.

Q. —whereas the deposit slips go in another direction to be credited to the particular account?

A. That is true. Mechanically if you walk—and you all have—up to a teller's window, the teller takes your checks and deposits them. She stamps certain identifying marks upon that deposit ticket. First to identify that it actually went through her cage; secondly, there are other notations made with respect to whether it is a mainland item. For example, the little numbers that you see [40] on the line

(Testimony of Carl R. Klenske.)

indicate the drawee, to the bank of which the check is drawn. And this is typical in banks because we attempt to balance and associate a particular series of deposits with a particular teller. I should say, we don't attempt. We actually do.

Q. Now, you say this procedure with regard to deposit slips is followed with individual accounts. Now, is it also followed with corporate accounts?

A. All accounts.

Q. All accounts? A. That's correct.

Q. You have mentioned a number on the check. What is that number called?

A. Well, there is a symbol on standard checks that is called a transit number.

Q. Transit number?

A. Transit number. It is the bank's own number. For example, 59102 means the Bank of Hawaii, 59 being Hawaii and 102 being Bank of Hawaii. And each bank has one of these numbers.

Q. Now, calling your attention to April and May of 1958—(Showing a document to Mr. O'Neill)—Mr. Klenske, I wish to show you various deposit slips which were credited to the ledger account of B. A. Williams II and Petroleum Company of America. (Showing some documents to the witness.) [41] Now, do you have in your possession the originals of those ledger sheets? A. I do.

Q. Would you take them out, please?

A. Yes. (Producing some documents.)

Q. Now, if you would refer to the original of the B. A. Williams II ledger sheet?

(Testimony of Carl R. Klenske.)

A. You said April and May?

Q. Yes, of 1958. Now, I hand you a photostatic sheet and ask you, is that a correct copy of it?
(Handing a document to the witness.)

A. It is.

Mr. Conklin: Your Honor, we offer this as exhibit 12.

The Court: There being no objection, it will be received as exhibit number 12.

(The document referred to was received in evidence as Plaintiff's exhibit No. 12.)

The Court: That is the ledger sheet of B. A. Williams II?

Mr. Conklin: Yes, your Honor.

The Court: Covering the months of April and May, 1958?

Mr. Conklin: It goes back a little further than [42] that but it does cover that period.

The Court: That will be exhibit number 12. Is this a convenient place to interrupt your examination?

Mr. Conklin: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, again before excusing you, you are instructed not to discuss this case with anyone, allow no one to discuss it with you, avoid reading or hearing anything about it and form no opinions about it. You are excused until 1:30 this afternoon. The Court will recess until 1:30.

(The Court recessed at 12:00 o'clock noon.)

(Testimony of Carl R. Klenske.)

Afternoon Session

(The trial resumed at 1:30 p.m.)

The Court: Let the record show that the jury is present, the Defendant and his counsel. Proceed, Mr. Conklin.

Q. (By Mr. Conklin): Mr. Klenske, do you have the original of the Bank of Hawaii ledger sheet for the Petroleum Corporation of America showing the ledger balances for the months of April and May, 1958? A. I do.

Q. You do? I hand you a document purporting to be a photostat of that and I ask you, is it a correct copy of the original itself up to the date of May 15th? (Showing document to Mr. O'Neill and then to the witness.) Mr. Klenske, do you have a copy of this ledger sheet showing the entire transactions of that particular page of the original?

A. I do.

Q. And this was prepared by you?

A. It was.

Q. So that you could keep the original, is that the idea? A. That's right.

Mr. Conklin: Your Honor, we would offer this in evidence as exhibit—— [44]

The Court: It will be received as exhibit number 13.

(The document referred to was received in evidence as Plaintiff's exhibit No. 13.)

Q. (By Mr. Conklin): Mr. Klenske, I show you

(Testimony of Carl R. Klenske.)

the original of a Bank of Hawaii deposit slip and I ask you, is that the original of a deposit slip made for Petroleum Corporation on April 25, 1958? (Handing a document to the witness.)

A. No, that is an original of a deposit ticket made to the account of B. A. Williams II, totaling \$44,000 consisting of two items.

Q. What is the answer?

A. It is an original of a deposit ticket to the account of B. A. Williams II of two items totaling \$44,000.

Q. On what date?

A. Dated April 25, 1958.

Q. And is this a true photostatic copy of it?

A. It is.

Mr. Conklin: Your Honor, we offer the photostatic copy in evidence.

The Court: There being no objection, it will be received as exhibit number 14.

(The document referred to was received in evidence as Plaintiff's exhibit number 14.) [45]

Q. (By Mr. Conklin): Mr. Klenske, showing you Plaintiff's exhibit number 12, being the ledger sheet of B. A. Williams II, would you indicate, if you could, so that the jury can see it what the various columns represent? (Handing document to the witness.)

A. Well, the columns on the right are the balances. And there is a date column to which these balances——

(Testimony of Carl R. Klenske.)

The Court: Just a minute. Can you turn around a little bit more?

The Witness: Yes. I will stand.

A. (Continuing) This column is a series of balances. (Indicating on exhibit.) This column is a series of dates to which these balances refer. This column is a series of deposits. The next three columns are checks drawn against these balances. And then this column are the pick-up balances from the preceding day. (Indicating on document.) The book-keeper inserts the present balance and that repeats over on the extreme left.

Mr. Conklin: May the record indicate that the witness has proceeded from the right hand side of the page, referring to certain columns, referring to vertical columns, and in his description has gone to the left?

The Court: The record will so show.

Q. In other words, Mr. Klenske, if you could hold that up so the jury can see that again—in other words, [46] the column on the far right refers to the balance on the day shown in the column second to the right? A. That is correct.

Q. So that while you have described the columns in a vertical manner, describing the columns, if one is to read the ledger, you are reading it horizontally, is that correct? A. That is correct.

Q. Now, showing you Plaintiff's exhibit number 13, Mr. Klenske, and referring you to the cash balance entries for May 15th and May 20th, on the extreme right of those balances are indicated some

(Testimony of Carl R. Klenske.)

letters. Could you state what those letters are and what they indicate, if anything?

A. Yes. On May 15th besides the total representing the balance are the initials or letters "O.D." which stand for overdrawn. And on May 20th there again appears beside the balance column, namely, \$50,697.55, the letters "O.D.," overdrawn.

Q. And would you explain what you mean when you use the word "overdrawn"?

A. Yes. The ordinary customer has money in the bank, and that appears in what we call a credit balance. When you have used up all your money, it is zero. When you have used more than what you have in the bank, you are overdrawn. And there are times when banks arrange with [47] customers to cover small over-drafts, a service charge, and that sort of thing.

Q. And was such an arrangement with the Petroleum Corporation of America in the Bank of Hawaii?

A. No, there was not.

Q. Was there such an arrangement with B. A. Williams II in the Bank of Hawaii?

A. No, there was not.

Q. Showing you again Plaintiff's exhibit number 13 and asking you to refer to that, what was the balance shown for Petroleum Corporation of America on April 30, 1958?

A. \$10.65.

Q. And what was the balance shown for the Petroleum Corporation of America on that same ledger sheet, exhibit 13, on May 6th, 1958?

A. \$510.65.

(Testimony of Carl R. Klenske.)

Q. Showing you a check drawn on the Bank of Hawaii dated April 27, 1958, payable to the Petroleum Corporation of America in the sum of \$18,000 and drawn by the Petroleum Corporation of America, I ask you, have you seen that check before? (Showing document to the witness.)

A. Yes, I have seen the check before. It was among the cancelled vouchers, cancelled checks that were delivered to me from the bookkeeping department in connection with this account. The reason it was delivered is because it is [48] an over-draft, an over-draft was reported. As a consequence of a return of the two checks from Seattle.

Q. And the maker of the check as indicated as being who?

A. Petroleum Corporation of America, signed by B. A. Williams.

Mr. Conklin: Your Honor, we offer this as exhibit 15.

The Court: There being no objection, it will be received as exhibit number 15.

(The document referred to was received in evidence as Plaintiff's exhibit number 15.)

Mr. O'Neill: What is the date?

Mr. Conklin: The 27th of April.

Q. (By Mr. Conklin): Showing you a similar check, Mr. Klenske, dated April 27, 1958, drawn on the Bank of Hawaii with the same date, same payee, same drawer, and being in the amount of \$27,000, I ask you, have you seen that check before? (Showing a document to the witness.)

(Testimony of Carl R. Klenske.)

A. I have.

Q. And under what circumstance?

A. Identical circumstance that I have just recited.

Mr. Conklin: Your Honor, we offer this as exhibit——

The Court: What was the amount of that check? [49]

Mr. Conklin: \$27,000, your Honor.

The Court: It will be received as exhibit number 16.

(The document referred to was received in evidence as Plaintiff's exhibit number 16.)

Q. (By Mr. Conklin): Showing you a like check dated May 5 with the same payee and the same drawer and being in the amount of \$25,000, I ask you, have you seen that check before? (Showing a document to the witness.)

A. I have.

Q. Under what circumstance?

A. The same as before, identical circumstance.

Q. I show you another check dated May 6, 1958, the same payee, the same drawer, drawn on the Bank of Hawaii, being in the amount of \$15,000, and I ask you, have you seen that check before? (Showing a document to the witness.)

A. I have, and under the same circumstance.

Q. I show you a check drawn on the Bank of Hawaii, May 7, 1958, with the same payee and the same drawer, and being in the amount of \$6,200, and I ask you, have you seen that check before? (Showing a document to the witness.)

(Testimony of Carl R. Klenske.)

A. I have and under identical circumstance.

Mr. Conklin: Your Honor, we offer the check dated May 5, 1958, as exhibit 17.

The Court: It will be received as exhibit number 17. [50]

(The document referred to was received in evidence as Plaintiff's exhibit number 17.)

Mr. Conklin: Your Honor, we offer the check dated May 6, 1958, as exhibit 18.

The Court: What is the amount of that?

Mr. Conklin: \$15,000.

The Court: That will be received as exhibit number 18.

(The document referred to was received in evidence as Plaintiff's exhibit number 18.)

Mr. Conklin: Your Honor, we offer the check dated May 7, 1958, in the amount of \$6,200, as exhibit number 19.

The Court: That will be received as exhibit number 19.

(The document referred to was received in evidence as Plaintiff's exhibit number 19.)

Q. (By Mr. Conklin): Mr. Klenske, showing you Plaintiff's exhibit number 15, I ask you, is it possible to determine from the check where that check was deposited? A. Yes.

Q. Is the place of deposit indicated on the check?

A. It is indicated by an endorsement stamp which all banks place on the back.

Q. What is that endorsement stamp? [51]

(Testimony of Carl R. Klenske.)

A. Seattle First National Bank, Seattle, Washington.

Q. Would you hold it up and indicate the endorsement stamp to the jury so that they can see it?

A. The blue in this area right here is the endorsement stamp of Seattle First National Bank, Seattle, Washington, the date line and then an endorsement guaranteeing all prior endorsements. (Indicating.)

Q. And what is the red stamp?

A. That is the Bank of Hawaii stamp. Upon receipt we in turn endorse as they go through to be posted to the account.

Q. When you say "posted to the account," you mean by that what?

A. Debited to the customer's account.

Q. And I show you Plaintiff's exhibit number 16 and I ask you, does the place of deposit of the check show on that exhibit?

A. Yes, it does.

Q. And what is that place of deposit?

A. The same stamp as heretofore described, Seattle First National Bank, identical blue block.

Q. And showing you Plaintiff's exhibit number 17, does the place of deposit appear on that check? (Showing a document to the witness.)

A. It is on this check but it is much fainter. You [52] have to look at it very carefully to see the impression in here. And that is Seattle First National Bank, Seattle, Washington.

Q. And likewise I show you Plaintiff's exhibit number 18 and ask you, does the place of deposit

(Testimony of Carl R. Klenske.)

of that check appear on the check? (Showing document to the witness.)

A. Yes, Seattle First National Bank, Seattle, Washington.

Q. And showing you Plaintiff's exhibit number 19, I ask you, does the place of deposit of that check appear on it? (Showing document to the witness.)

A. Yes, it does, Seattle First National Bank.

Q. And when you say Seattle First National Bank, you are referring to the endorsement stamps that appear as you have indicated to the jury on the back of the check? A. That is correct.

Q. Now, those exhibits I have just shown you, Mr. Klenske, and which you just identified, do you know how those checks were received by the Bank of Hawaii?

A. Oh, yes. They were received in what we call the cash letter, which is nothing more than another way of describing a deposit made by that bank with us. These various and sundry checks that are sent from one bank to another are listed on a sheet of paper about so big to reach a total, and on that sheet of paper there are [53] instructions as to what to do with the money because banks have relations with other banks. (Indicating.) Some have accounts with banks; some have accounts with other banks. And in these so-called cash letters these instructions will tell the bank on whom all these checks are drawn, how to credit the sending bank, how to pay the sending bank for the total of the checks. Maybe by check, maybe by credit to an

(Testimony of Carl R. Klenske.)

account. The bank keeps that with that drawee's bank. It may be by remitting to another bank for the credit of the sending bank.

Q. Now, you refer to a cash letter. How is that cash letter received by the Bank of Hawaii?

A. That is received by mail again. There just isn't any other way of getting checks from the mainland to here.

Q. Were these particular checks,—referring to the exhibits I have just shown you, being numbers 15 through 19 inclusive—were they received in such fashion through the mail?

A. Yes, they were. As a matter of fact, we use an identifying code on all cash letters received as a part of control and auditing purposes. You will find on the reverse of each check either CCL or CL with a number and a date. That CCL refers to a cash letter. The number refers to the sending bank and the date, of course, refers to the date. [54]

Q. You are referring to this stamp that is on the back of the particular exhibit?

A. That's right.

Q. 17?

A. CCL 14 and May 7th, CCL 14, May 9th; 14 meaning a code number for the Seattle National Bank and CCL means the cash letter received on May 9th.

Q. Showing you Plaintiff's exhibit 12 and Plaintiff's exhibit 14, exhibit 12 being the ledger sheet for B. A. Williams II, and exhibit 14 being the Bank of Hawaii deposit slip to the account of B. A.

(Testimony of Carl R. Klenske.)

Williams II, dated April 25, 1958, I ask you to compare those two, and I ask you on April 25, 1958, was that ledger sheet, the account, does a credit appear on the ledger sheet crediting that account with the sum of money shown on the deposit slip? (Handing documents to the witness.)

A. Yes, April 25 in the third column I mentioned being the deposit column, there is the entry \$44,000. That is April 25. And showing a balance of \$39, 130.26. And this is the deposit ticket showing the same date.

Q. Again, by way of a random sample, I ask you to compare Plaintiff's exhibit number 13, being the ledger sheet for the Petroleum Corporation of America, with Plaintiff's exhibit number 8, being a deposit slip to the Petroleum Corporation of America dated May 12, and I [55] ask you, does the amount indicated by the deposit slip appear on the ledger sheet as a credit on that day? (Handing document to the witness.)

A. Yes, it does, right here, May 12. (Indicating.)

Q. The deposit was for how much?

A. \$1,000.

Q. And the credit on the ledger sheet was for——

A. \$1,000, on the 12th, May 12th.

Q. Showing you Plaintiff's exhibit number 11, being a check dated May 14, 1958, drawn on the U. S. National Bank, Denver, Colorado, in the sum of \$50,000, I ask you, Mr. Klenske, have you seen

(Testimony of Carl R. Klenske.)

that check before? (Handing document to the witness.) A. Yes, I have.

Q. Would you explain, please, when, where and under what circumstance?

A. Well, this check was presented for deposit by Mr. Ranieri, the date being right under that, May 14th, and because there was then in existence an over-draft in excess of \$50,000, Mr. Ranieri brought this check in presumably to cover that over-draft, since we had received a telegram from the Seattle Bank advising us that two checks in the amount of \$25,000 each were not paid. And we had, of course, paid items against that particular fictional balance. [56] Then this was tendered in payment of this over-draft. So rather than send it through regular deposit channels, which as I explained earlier takes some time, in this particular case in Denver of the inside three days, I sent this direct, and that is a way banks employ, as I previously mentioned, that we can send a check direct to the bank on which the check is drawn and in that sending, which is a letter again, instruct the bank to whom to pay the proceeds for our credit. And I actually instructed our collection manager to handle this check in that fashion. And at the same time I sent a wire to the Denver Bank asking if the account was good for that amount. And I received a reply some time later in the afternoon—I don't remember the time—telling me no, not at present. Well, that is commonplace, too, in banks. If an account is not good at the moment, at the moment

(Testimony of Carl R. Klenske.)

the wire is received, they will tell you so. But that doesn't mean that perhaps by the time the check gets there, which means over night, by airmail, and in this particular case perhaps even two days, that funds wouldn't be there to meet the check when it arrives because the check cannot be paid until it is physically presented to the paying bank.

And so those were the circumstances under which I learned of this check. Well, after that, of course, we received again in the course of common banking practice, [57] when the Denver Bank had received this check, they wired non-payment, and we had as a matter of fact asked them to wire FATE, the fate of an item. It is another way of saying, tell me whether it is paid or not paid? If you just say "wire, non-payment," that is all they will do. They will wire if it is not paid. In this case I wanted to know whether it was or was not paid. So I received a wire advising that it was not paid and it would be returned. That is the story on that check.

Q. Again showing you the check which you had just had, being exhibit number 11, and also showing you exhibit number 9, being a check dated May 12th for \$1,000 on the U. S. National Bank of Denver, and likewise showing you Plaintiff's exhibit number 8, being the deposit slip that goes with that \$1,000 check, and showing you Plaintiff's exhibit number 10, being the deposit slip that goes with the \$50,000 check, I ask you, was the deposit amount as shown by exhibit 8 credited on the ledger sheet for Petroleum Corporation of America, which you

(Testimony of Carl R. Klenske.)

have in your hand? (Handing documents to the witness) A. Exhibit 8 being the \$1,000?

Q. \$1,000 deposit slip.

A. Yes, it is shown on the ledger under date of May 12th?

Q. Now, how about the deposit slip for May 14th? [58] A. It is not shown.

Q. Why not?

A. It is not shown because I told you I made a special collection item of it. And we were not going to add credit to this account to wipe out an existing over-draft because we wanted to be sure that the check would be good. Now, as I have already testified, in the afternoon we got a wire telling us that it was not good. And the following day we got a wire telling us that the check had not been paid. And in the handling of collection items, we never give immediate credit. That is the purpose in handling it especially in this fashion. So the credit will not appear on the ledger sheet.

Q. And you say you had not given credit for this \$50,000 check because you had received notice the day before from the Seattle Bank?

A. That is right. No, not the day before. Let me see. It is my recollection that the wire from the Seattle Bank was about—I don't recall—I can check. I think it was the 13th. (Examining some papers.) That's right, the day before the 13th was the day that the Seattle Bank had wired us non-payment on the two \$25,000 items.

(Testimony of Carl R. Klenske.)

Q. Are you acquainted with the Defendant, Mr. B. A. Williams II?

A. I had met Mr. Williams. [59]

Q. Have you had conversations with him?

A. I had.

Q. Could you tell the jury under what circumstance?

A. I met Mr. Williams on, I think it was, June 16th. That is several days after he had arrived here.

The Court: What year?

The Witness: 1958. I had been in contact with Mr. Williams through Mr. Ranieri over this situation and had been assured that Mr. Williams was going to visit the city. And he did in fact turn up, as I said, I think it is the 16th of June in the morning. And we then discussed this matter. And he had assured me that he was doing everything possible to cover this over-draft.

The Court: And instead of saying "assured," would you give what you said and what he said, as best you can remember? Where did this conversation take place and who else was present, if anyone?

The Witness: He came to the bank at my desk on the main banking floor. And we discussed the matter of covering this over-draft. I asked him specifically what he was going to do about it, and he assured me that he intended to take it up. And at that time he told me that he was about to sell some oil leases through a firm—well, I don't remember the name of the firm. I have it in my rec-

(Testimony of Carl R. Klenske.)

ords. But in any event, we then got into a [60] conversation about the legality of assigning these leases or assigning the proceeds of the leases, since this was a corporation. I asked him if he had the right. He assured me he did. I asked him if the sum of money would be adequate to cover this. I recall he said that, yes, there was approximately \$150,000 worth of leases, some of which were wild-cat and some of which were in another field. I don't particularly recall any reference to specific leases as such, however. But most of the conversation centered around this lease business. So because of the legal question I asked Mr. Williams if he could meet with me that same afternoon or in the presence of our attorneys to investigate this particular problem. And he said, yes, he would be glad to. And he did. The only person present at that conversation——

Q. (By Mr. Conklin): Which conversation, now, in the morning?

A. This morning conversation. Well, my secretary is always right there. That's the only person that was there.

Q. And did Mr. Williams meet with you in the afternoon? A. He did.

Q. And what was the conversation at that time?

A. Well, since our attorney, Mr. Kidwell, hadn't arrived, we then went into this matter of the overdraft. [61] At that time I specifically asked him if this situation had come to pass by intent. As a matter of fact, I think my very words were, "you

(Testimony of Carl R. Klenske.)

know you were kiting.” And he answered and said, yes, but it didn’t start out that way.

Q. Well, when you used the word, you said to him “you knew you were kiting,” and what did you mean by the use of that word as you used it to him?

A. Well, that is a practice, that is a term used to define a practice of creating fictitious balances by drawing against uncollected funds. And it must of necessity involve two or more banks and it must involve two or more people, although one person can carry a thing on by very careful maneuvering, by mailing back and forth. But the trick is that you must deposit in two banks and then draw against those funds.

Q. Now, Mr. Klenske, showing you various deposit slips, being Plaintiff’s exhibit number 14, which is a slip dated April 25, then the deposit slip dated May 2nd, which is exhibit number 3, a deposit slip dated May 7th, which is number 4, a deposit slip dated May 8th, which is number 6, and a deposit slip which is dated May 12th, which is number 8, a deposit slip dated May 14, which is number 10, showing those deposit slips to you, I ask you, do you know of your own knowledge that the checks represented by those deposit slips—you have already testified that all checks drawn on out-of-state [62] banks are sent by the Bank of Hawaii through the mail—do you know whether it is to a correspondent bank or directly by special handling or whatever the term was? You have already testified to that. My question relates to this: As to the checks shown on those deposit slips, not generally, but those, did the

(Testimony of Carl R. Klenske.)

Bank of Hawaii receive notification that those checks had been received by the specific banks upon which they were drawn?

A. In the case of the April 25th for \$44,000, yes, it was paid. In the case of May 2nd, 1958, for \$45,500, yes, it was paid. In the case of May 7th, 1958, for \$25,000, yes, it was not paid. We were so advised by telegram in that case. In the case of May 8th, 1958, \$25,000, yes, because it was not paid. And again by telegram. In the case of May 12, 1958, yes, because it was not paid and we were again advised by telegram. And in the case of May 14, 1958, \$50,000, yes. And I have already explained why.

Mr. Conklin: No further questions, your Honor.

The Court: Cross examination, Mr. O'Neill?

Cross Examination

Q. (By Mr. O'Neill): Mr. Klenske, you talk about a practice between banks of notifying one another when these funds are in transit, is that correct, when funds are floating back and forth across the country, that notification is given between banks. [63]

A. I don't think I said that. I don't follow you.

Q. Well, when you send funds such as in this case, in this particular case, say from Denver or from Hawaii, you would send it normally to the Wells Fargo Bank in San Francisco, is that right?

A. Yes, that is right.

Q. Now, then, you could also, or part of that,

(Testimony of Carl R. Klenske.)

you could notify, say the Wells Fargo Bank to credit your account in Philadelphia, is that right?

A. That's right.

Q. And then you could—this bank here, say, the Bank of Hawaii, could draw funds against that bank in Philadelphia, is that right?

A. That's right.

Q. And if, say, that you had notified on, say, this morning, that the Bank of Hawaii notified the Wells Fargo Bank in San Francisco to deposit so much money or credit so much money to the Bank of Hawaii account in Philadelphia, then you would immediately commence drawing against that account if you wanted to pay something else on the east coast, isn't that right? A. We could.

Q. And if you failed to get that in time, failed to get it or they failed to get the notification to the bank in Philadelphia, or the Wells Fargo failed to get that to them in a quick amount of time, that is what you mean by [64] kiting, isn't it, back and forth between the banks? That would be the same thing? A. No, it wouldn't.

Q. Drawn against uncollected funds?

A. No, it wouldn't.

Q. Or if there was a failure to make a deposit or failure to give the proper notice?

A. That isn't what I mean by it.

Q. That could happen and that sort of thing can happen?

A. That sort of thing can happen but that is not an arrangement.

(Testimony of Carl R. Klenske.)

Q. In this particular case you say that it is a matter of practice which the bank that you send a notification, as you did here to Denver, asking as to whether or not this \$50,000 item was good. And they made the statement to you, not at present. But what they meant was that you mailed the check and you sent the wire? A. That's right.

Q. So on the day that they received your wire they were making the statement it was not good at that time or not present, that presently the funds were not on deposit? A. That is correct.

Q. That happens quite frequently in the banking business, doesn't it? [65]

A. I won't say it happens quite frequently because if it did you wouldn't have those accounts.

Q. Quite often or it happens?

A. It happens.

Q. All right. In other words, it is a sort of a thing that can happen to anybody in business under certain circumstance? A. That's right.

Q. Now, Mr. Klenske, in connection with this, weren't you kept notified at all times that Mr. Williams was attempting to put the money in the bank in Denver through Mr. Ranieri and others here?

A. Yes, I say that I have been repeatedly told.

Q. They kept you fully advised of it?

A. By Mr. Ranieri, well, solely by Mr. Ranieri but he would quote Mr. Williams since I had not met him, that he was trying to raise the money and it was coming from Seattle or from Denver. That is true.

(Testimony of Carl R. Klenske.)

Q. In other words, they never attempted to keep anything from you? They simply said they didn't have the money at the time but they were desperately trying to get it to cover that check?

A. They told me that they were making every effort to cover that check, that is true. [66]

Q. Now, on this over-draft that we have been talking about here in the Bank of Hawaii, were checks drawn against that by Petroleum Corporation of America, against these deposits of funds?

A. Yes.

Q. Was any of that money received by Mr. Williams?

A. That I really can't say. There were checks paid against it that weren't payable to Mr. Williams.

Q. There were checks drawn against that?

A. The great proportion of that.

Q. But none of them payable to Mr. Williams?

A. I would hesitate to say. I don't know.

Q. Could you check that?

A. I would have to check it. I might add that that would become somewhat difficult to determine since we would have difficulty in knowing at what point anything was paid out of this that may relate or may not relate to that \$50,000, or something that had been in the account prior thereto.

Q. But you have a list?

A. Yes, I have a list of said checks, yes. For example, there is a check paid for \$27,520.09 on the 14th of April to Jim Green. There is a check for

(Testimony of Carl R. Klenske.)

\$1,100 on the 17th payable to K. & B. Wells Services. A check for \$5,000, April 21, 1958, payable to T. N. Jordan. There is a check [67] for \$650 of April 25th, payable to B. A. Williams. This was endorsed for deposit to the account of Byron A. Williams of Commerce Trust, Kansas City.

Q. Do you know whether or not that is Mr. Williams' father who is now dead?

A. I had been told that is so. Then there was a \$7,500 check dated May 2nd which was divided as follows—and this was done by wire—\$1,000 to Mr. B. A. Williams; \$1,500, U. S. National Bank of Denver, deposited to the account of the Petroleum Corporation; \$5,000 to Fred B. Wallace at Borger, Texas; \$500 to Janoil Corporation, that is, May 5th, the date of that one. That is substantially what I know of those particular checks.

Q. Now, also during this period of time didn't Mr. Williams advise you that he would have been in Honolulu earlier except for the death of his father in Oklahoma right around the first of June?

A. He did indeed say that.

Q. And that was the reason that delayed him in getting here to take care of this?

A. Yes, that is what I was told.

Q. Also didn't he send funds or authorize funds from his personal account to be applied against this over-draft? We will put it this way: weren't funds from his personal account applied against this over-draft? [68]

(Testimony of Carl R. Klenske.)

A. Yes. The balance that existed in the personal account was applied to this over-draft.

Q. And just so that we are completely clear, Mr. Williams did come in in June of 1958 and paid this over-draft in full, didn't he?

A. Well, no, he didn't.

Q. The money was credited to his account, is that right?

A. A group of investors paid it off in June.

Q. June 25th? A. June 26th.

Q. 26th? A. Yes.

Q. In other words, the bank has been reimbursed in full? A. In full, that is correct.

Q. There is not one cent owing from Mr. Williams to the bank at this time except some attorney's fees?

A. Well, small attorneys' fees, that's right.

Q. But other than that, the over-draft has been paid in full as far as the bank is concerned?

A. That is correct.

Q. Restitution has been made completely, in full? A. That is correct.

Q. And the first time Mr. Williams talked to you [69] about that in Honolulu, I believe you stated that was June 16th in your office in the Bank of Hawaii, and you mentioned this check-kiting thing to him and he stated that it never was intended to be that way and it never started out that way?

A. That is what his statement was, yes.

Q. Did he tell you that he was relying upon what

(Testimony of Carl R. Klenske.)

had been told him by his office manager in Seattle, that interests had been sold, that the Petroleum Corporation of America had sold their working interest in these wells and that money was being deposited to that bank in Seattle?

A. No, but he told me that he had expected to receive money in the Seattle operation, I think is the way he referred to it, and that it hadn't come through.

Q. That is why this whole thing got started and he was just attempting to keep it going until he could get the money, sell the leases or do something, is that right?

A. Well, that was the implication, yes.

Q. In other words, there was a completely honest motive behind the whole thing? There was never anything fraudulent or ever intended to be fraudulent when this whole thing started? It was an honest mistake, is that right?

A. Well, I couldn't answer to that.

Mr. Conklin: Your Honor—well, it has already [70] been answered.

Q. (By Mr. O'Neill): One thing I wanted to clear up. Mr. Klenske, at the time he stated to you in the bank in Honolulu, at the time he stated it, was he intending to pledge to the bank the leases or the proceeds from the sale of leases?

A. He made that offer.

Q. And was he also to assign to you or attempt to assign to you the accounts receivable of the corporation?

(Testimony of Carl R. Klenske.)

A. No. The proceeds on that Dakota operation were to go to the investors here whose dividends hadn't been paid.

Q. In other words, he was going to take care of all of the money, that the oil returns were to be paid to the investors here and these lease sales were to be assigned to the bank as security for this money?

A. That's right.

Mr. O'Neill: Thank you very much. I have no further questions, your Honor.

The Court: Redirect, Mr. Conklin?

Redirect Examination

Q. (By Mr. Conklin): You stated on cross examination, Mr. Klenske, that you were kept informed by Mr. Ranieri, who told you what Mr. Williams was saying with regard to trying to raise [71] the money. Now, when was that?

A. Well, that went along obviously from April 14th until June 26th.

Q. You mean April 14th or May 14th?

A. I'm sorry. No. Wait a minute. No, from May 14th to the time we were advised of the overdraft, this became a problem of mine at that instance and was with me until June 26th or 28th.

Q. So that with regard to your being kept advised by Mr. Ranieri and/or Mr. Williams, that commenced with May 14th, is that correct?

A. Yes, it is May, because the two \$25,000 items were returned in May. It is May.

Q. And you first met Mr. Williams in June?

(Testimony of Carl R. Klenske.)

A. That's right. The only word I had on this whole subject was always related through Mr. Ranieri who was most obliging. He would tell me these things. But I was only concerned about one thing: Where was the money and where was it coming from and when?

Mr. Conklin: No further questions.

The Court: Any recross, Mr. O'Neill?

Mr. O'Neill: No, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness. [72]

ROBERT C. H. CHUNG

a witness called by the Plaintiff, being duly sworn, testified as follows:

Mr. Conklin: Your Honor, may we have your indulgence, if we could? There may be a possibility of eliminating this witness.

The Court: To save time, you may have a moment.

Mr. Conklin: Thank you, your Honor.

(Counsel confer.)

The Court: Perhaps we had better start.

Mr. Conklin: Your Honor——

The Court: It looks like we might as well swear the witness and ask him questions.

The Clerk. He has already been sworn.

The Court: What is your name, please?

The Witness: Robert C. H. Chung.

Mr. Conklin: Your Honor forced us into an agreement.

The Court: Very well.

Mr. Conklin: The use of this witness is unnecessary, your Honor, and we will withdraw him with your Honor's permission.

The Court: Very well. You are excused, Mr. Chung.

Mr. Conklin: Thank you very much, Doctor.

And in lieu of the Doctor's testimony, we will stipulate to the introduction of two affidavits, one by the Defendant and one by Warren P. Doing, both of which were executed before a Notary Public in Colorado.

The Court: As to the truth of the contents of the statement?

Mr. Conklin: No, your Honor. I feel—on the part of both sides—that is subject to clarification or impeachment——

The Court: Very well. That is your understanding, that these two documents may be received, Mr. O'Neill?

Mr. O'Neill: That's right, your Honor.

The Court: The first one, that is the affidavit of the Defendant,——

Mr. Conklin: The affidavit of the Defendant.

The Court: ——will be received as exhibit number 20, and the affidavit of Mr. Doing will be received as exhibit number 21.

(The documents referred to were received in evidence as Plaintiff's exhibit numbers 20 and 21.)

PHILIP V. TAGGART

a witness called by the Plaintiff, being duly sworn,
testified as follows:

Direct Examination

Q. (By Mr. Conklin): Would you state your name, please?

A. Philip V. Taggart, T-a-g-g-a-r-t.

Q. And where do you reside, Mr. Taggart?

A. Seattle, Washington.

Q. And where are you employed?

A. Seattle First National Bank.

Q. How long have you been employed there?

A. Approximately 30 years.

Q. What is your position with that bank?

A. I am Assistant Vice President of the bank.

Q. Are you familiar with the operation of that bank, its operation? A. I am.

Q. Would you explain what the procedure is followed by the Seattle First National Bank with regard to deposits of checks drawn on banks outside of Seattle?

A. Would you restate that, please?

Q. Are you familiar with the procedure followed by the Seattle First National Bank with regard to checks deposited in the bank drawn on banks outside of Seattle? Are you familiar with the procedure? A. Yes.

Q. And what is that procedure?

A. Well, when a check is drawn on an out-of-town point—I am speaking of a larger amount——

(Testimony of Philip V. Taggart.)

The Court: Just a moment, Mr. Taggart. You will have to keep your voice up.

The Witness: Yes, sir.

A. (Continuing) A depositor comes in to make a deposit with an out-of-town check. If it is a sizeable check, it is scrutinized and if it is deposited by a customer that we are not too well-acquainted with, why, it will have to go to an official of the bank for OK for immediate credit. Otherwise we will hold the check until—we will not pay against the check until the funds are collected.

Q. What is the mechanical procedure within the bank, is the purpose of my question, with regard to such check deposits?

A. Well, the check would go through our transit department and mailed out to the bank in which it is drawn.

Q. And is there any other part of the procedure, mechanical procedure in the bank?

A. Well, it would be—the deposit slip would go through and if there was a hold on the funds until the check was collected, that notation would be made to that effect until we found out that the check had been paid.

Q. Well, what way do you mean the deposit slip would go through?

A. To the customer's account.

Q. Well, would you explain how that process works, [76] please?

A. There would be a notation on the ledger

(Testimony of Philip V. Taggart.)

sheet to the effect that no funds were to be paid against that account until the check was collected.

Q. Well, what I am getting at is, what happens to the deposit slip, as you call it, the deposit slip with regard to the customer's ledger? A. Yes.

Q. What is the relationship between those two?

A. Well, the customer makes the deposit. That goes to the bookkeeper.

Q. What goes to the bookkeeper?

A. The deposit.

Q. Continue.

A. And a note is made to the effect that no funds are to be paid against that deposit until a check has been made.

Q. Mr. Taggart, in April and May of 1958 did Petroleum Corporation of America have an account in the Seattle First National Bank? A. Yes.

Q. And do you have the ledger sheet for that account for the months of April and May of 1958?

A. Yes.

Q. Would you produce it, please? (Witness produces [77] a document.) I ask you to compare your ledger sheet with this one which has been furnished to me by defense counsel. (Handing document to the witness.) I am sure they are going to be the same. A. Yes, that is the same.

Q. And have you compared the two sheets, ledger sheets handed to you by me with the bank's own ledger sheet? A. I have.

Q. And are they exactly the same?

A. Yes.

(Testimony of Philip V. Taggart.)

Mr. Conklin: We will offer these two ledger sheets in evidence, your Honor. The ledger sheet commences with April 22nd, 1958, and on the next page it commences with April 30, 1958. So they probably should be part of one exhibit.

The Court: Were those furnished to you by counsel?

Mr. Conklin: Yes, for the Defendant, your Honor.

The Court: Well, the two sheets will be one exhibit, number 22.

(The documents referred to were received in evidence as Plaintiff's exhibit number 22.) [78]

Q. (By Mr. Conklin): Showing you a photostat of a deposit slip for the Seattle First National Bank, dated April 28, 1958, I ask you, have you seen the original of that deposit slip? (Handing a document to the witness.)

A. I have it here.

Q. You have it in your possession?

A. Yes.

Q. Would you take it out and let's make sure? That is April 28th.

The Court: You have several of those, Mr. Conklin?

Mr. Conklin: Yes, your Honor, I have.

The Court: Supposing you take a short recess and you can examine them, Mr. O'Neill, with Mr. Conklin if they are all accurate. And it will expedite matters.

(Testimony of Philip V. Taggart.)

Ladies and gentlemen of the jury, you will be excused for a 10-minute recess.

(Jury leaves courtroom at 2:50 p.m.)

The Court: How are you doing timewise?

Mr. Conklin: I have one more witness. This witness will be shorter than Mr. Klenske and the next one will be even shorter.

(A recess was taken.)

After Recess

The Court: The record will show that the jury [79] is present, the Defendant and his counsel. Proceed.

Mr. Conklin: Your Honor, counsel will stipulate to the introduction of four Seattle First National Bank deposit slips.

The Court: Very well. Start with the earlier one and it will be exhibit number 23.

Mr. Conklin: Exhibit number 23 would be dated April 28. And exhibit 24——

Mr. O'Neill: What is the amount of that?

The Clerk: \$45,000.

(The document referred to was received in evidence as Plaintiff's exhibit number 23.)

Mr. Conklin: Exhibit 24 is dated May 5 and is in the amount of \$25,000.

(The document referred to was received in evidence as Plaintiff's exhibit number 24.)

Mr. Conklin: Exhibit 25 is dated May 6th and is in the amount of \$15,000.

(Testimony of Philip V. Taggart.)

(The document referred to was received in evidence as Plaintiff's exhibit number 25.)

Mr. Conklin: And exhibit 26 is dated May 7th, 1958, and is in the sum of \$6,200.

(The document referred to was received in evidence as Plaintiff's exhibit number 26.)

The Court: Very well, they will be received as [80] exhibit number 23, 24, 25 and 26. Those are all deposit slips for the Seattle First National Bank?

Mr. Conklin: Yes, sir, your Honor, with the depositor being named as the Petroleum Corporation of America.

Q. (By Mr. Conklin): Mr. Taggart, showing you Plaintiff's exhibit number 22, which is the ledger sheet for Petroleum Corporation of America in the Seattle First National Bank covering the period of April and May, 1958, and showing you Plaintiff's exhibit number 23, which is a deposit slip dated April 28th and is in the total sum of \$45,000, is there a credit in the ledger sheet for that deposit? (Handing documents to the witness.)

A. Yes.

Q. There is? And showing you Plaintiff's exhibit number 24, which is a deposit slip dated May 5, 1958, and the slip is for \$25,000, is credit of \$25,000 on the ledger sheet for that date?

A. Yes.

Q. And showing you Plaintiff's exhibit number 26, which is the deposit slip for May 7th in the sum

(Testimony of Philip V. Taggart.)

of \$6,200, does a credit appear on the ledger sheet for that date? (Handing document to the witness.)

A. Yes.

Q. Of that amount? A. Yes, sir. [81]

Q. And showing you Plaintiff's exhibit number 25, being a deposit slip dated May 6th for \$15,000, does a credit appear for that amount on the ledger sheet? (Handing document to the witness.)

A. Yes, it does.

Q. According to that ledger sheet, Mr. Taggart, what was the balance in the Petroleum Company of America account on April 25?

A. The balance in the account on April 25, was \$2,196.85.

Q. And what was the balance on May 2nd, 1958?

A. The balance on May 2nd was \$7,067.19.

Q. And what was the balance on May 8th, 1958?

A. The balance on May 8th was \$4,974.53.

Q. And did this particular account of the Petroleum Corporation of America have any credit arrangement with the Seattle First National Bank?

A. No, they did not.

Mr. Conklin: Your Honor, counsel will stipulate to the introduction of a corporate resolution of authority by which the Petroleum Corporation of America authorized persons named in the resolution to draw against the corporate account in Seattle First National Bank. And the signature [82] card, together with such corporate checking account.

(Testimony of Philip V. Taggart.)

The Court: Very well. That will be received as exhibit number 27.

(The documents referred to were received in evidence as Plaintiff's exhibit number 27.)

Q. (By Mr. Conklin): Now, Mr. Taggart, with reference to Plaintiff's exhibit number 22, did you hear the testimony of Mr. Klenske this morning as to how the Bank of Hawaii set up its ledger accounts? A. I did.

Q. And is the same procedure followed by the Seattle First National Bank?

A. Yes, sir, it is.

Q. Very well, Mr. Taggart, showing you in a group Plaintiff's exhibit number 16, number 15, 17, 18, and 19, will you examine the face of those checks and also the back for the endorsement? Now, do those checks indicate where those checks were deposited? A. Yes, they do.

Q. All of them?

A. All but one, one is a little faint.

Q. Well, except with regard to that one,—which is what? Is it this one? A. Yes.

Q. That is Plaintiff's exhibit number 17. With [83] regard to the other exhibits you have in your hand, you say they do exhibit where those checks were deposited? A. That's correct.

Q. And where were they deposited?

A. Seattle First National Bank.

Q. And you have previously testified as to the routine that was followed, that is followed by the Seattle First National Bank with regard to checks

(Testimony of Philip V. Taggart.)

deposited in the Seattle National Bank but drawn on out-of-town banks? A. Yes, sir.

Q. Was that same routine followed with regard to these checks?

A. Yes.

Q. Now, with regard to exhibit 17,—and if you would examine that—does that indicate where it was deposited? A. It is written in ink here.

The Court: What is the answer?

The Witness: It is written in in ink. But there is a slight—apparently the endorsement stamp didn't take on this one.

Q. (By Mr. Conklin): And what is the indication of the mark of that stamp?

A. It is a blue ink. There is a slight trace of it here. [84]

Q. And what would that indicate?

A. Well, it would indicate that it had gone through the endorsement machine but might have——

Q. Whose endorsement machine? A. Ours.

Q. What is that? A. The bank's.

Q. When you say the bank's, you mean the Seattle First National Bank? A. Yes.

Q. And with regard to that exhibit, what is the routine for forwarding checks followed with regard to that particular check—was the routine for forwarding checks followed with regard to that particular check? A. Yes.

Q. Now, you have testified generally as to the routine followed by your Seattle First National

(Testimony of Philip V. Taggart.)

Bank in forwarding checks drawn on out-of-town banks. You state that these checks followed exactly the same routine? A. Yes.

Q. Now, could you tell us exactly how these checks were forwarded and by what means forwarded to the Bank of Hawaii?

A. Well, they went right through our transit department, sent out airmail to the Bank of Hawaii.

Mr. Conklin: No further questions.

Mr. O'Neill: I have just a couple of questions.

Cross Examination

Q. (By Mr. O'Neill): Mr. Taggart, on the corporate resolution which was introduced into evidence here, have you seen this, the photostat of this? A. No, I haven't.

Q. Can you state as to whether or not what is marked and admitted here as people's exhibit number 27, I believe——

The Court: Yes, 27.

Q. (Continuing) ——is that a photostat of the resolution on file with your bank? (Handing document to the witness.) A. Yes.

Q. And do you happen to know M. A. Harris? Who is that? A. No, I don't.

Q. Do you know Ralph Purvis?

A. No, I don't.

Q. Do you know Warren P. Doing?

A. I met him.

Q. Is Mr. Purvis a State Senator and Attorney in [86] Bremerton, Washington?

(Testimony of Philip V. Taggart.)

A. I know his name but I don't know.

Q. The name and occupation? A. Yes.

Q. Now, one thing about this exhibit number 22, which, I guess you would call it the statement or ledger sheet of the Seattle First National Bank—is that correct? A. That's correct.

Q. Referring to that exhibit, of these deposits which were made in the Bank of Hawaii, was ever at any time checks drawn against those deposits by Petroleum Corporation of America?

A. Would you state that again?

Q. Referring to those items, and those were the ones which were placed in the Bank of Hawaii, in your bank, is that correct? A. Yes.

Q. At any time did the Petroleum Corporation of America ever attempt to draw any checks on the Seattle First National Bank against those deposits?

A. Yes.

Q. Those were not on those deposits, were they?

A. Those were on other deposits.

The Court: You will have to keep your voice up.

The Witness: There were checks drawn against these deposits.

Q. Against those deposits? A. Yes.

Q. But every other check was good as shown by every other deposit and the balance? A. Yes.

Mr. Conklin: Could we have a clarification what he means by every other check? I don't follow it.

Q. (By Mr. O'Neill): Well, there is a deposit here for \$5,000? A. Yes.

Q. A deposit for \$5,200? A. Yes.

(Testimony of Philip V. Taggart.)

Q. A deposit for \$45,000? A. Right.

Q. That is one of those you have been referring to? A. Yes.

Q. And you get on over here, \$7,800?

A. Yes.

Q. \$6,200 and a \$100? A. Yes.

Q. And every check drawn against those that I have talked about was a good check and was paid by your bank, is that right? [88]

A. That's correct.

Q. The only thing that we are talking about is these other amounts which were deposited by the Bank of Hawaii, is that right? A. Yes.

Q. And your bank never gave credit for those? Never accepted them, did they? They were always held for collection? A. Held for collection.

Q. So your bank never gave credit. It was strictly a suspension item?

A. We did give credit.

Q. You merely made a paper transaction, is that what you are talking about? Isn't that right?

A. We did pay against them.

Q. You paid against them?

The Court: I can't hear you, Mr. Taggart. I have to hear the evidence in this case, too.

The Witness: We paid against those checks.

Q. (By Mr. O'Neill): Who did you pay?

A. I didn't see the actual checks myself.

Q. You never paid the Bank of Hawaii for those checks?

(Testimony of Philip V. Taggart.)

Mr. Conklin: Again, your Honor, what checks are you referring to? [89]

Mr. O'Neill: Specifically the deposits referred to here, \$28,000 and \$16,000.

Mr. Conklin: Those are checks drawn on the Bank of Hawaii?

The Witness: Those are drawn on the Bank of Hawaii.

Q. (By Mr. O'Neill): And you never paid those? A. Yes, we paid against them.

Q. Who did you pay?

A. I don't know how they went out. Here is the check against the deposit. And the funds were withdrawn the same day they were paid in.

Q. That what you are talking about is a paper transaction between your bank and on this sheet, isn't that right?

A. Well, the balance went down. We paid the checks.

Q. Now, the testimony of Mr. Klenske from the bank is that they were returned. The Bank of Hawaii never received credit from you and you never paid the Bank of Hawaii.

A. Yes, I think we did.

Q. You think you did? A. We did.

Q. Do you have the record of that?

A. I can't tell you who the funds were paid to.

Q. Or even if they were paid?

A. Our ledger sheet indicates that the funds were withdrawn.

(Testimony of Philip V. Taggart.)

Q. But don't they also indicate that everything was in error, all of those deposits were in error?

A. No.

Q. I am going to hand you what appears to be a photostat of the bank record and ask you as to whether or not along side of certain deposits which you testified to isn't there stamped in "error"?

A. Which ones are you talking about?

Q. Right here and here and here, the same as appears on the one you have got in your hand. (Indicating on document.)

A. Are you talking about one particular deposit?

Q. I am talking about every one of the deposits which appears on this sheet where the word "error" is stamped along side of it.

A. Well, those were posted to the account before the deposit slip had gotten up there, and posted in error.

Q. Posted in error? A. Yes.

Q. Because those were still suspension or collection items, isn't that right? [91]

A. That's right.

Q. And when you finally, when the thing finally worked out, you brought it down to the balance here, brought it down to the balance here of \$1,274.17, isn't that right?

A. You are talking about April 30th?

Q. Yes.

A. There was a deposit on April 30th of \$45,000. And on the same day there were two checks paid

(Testimony of Philip V. Taggart.)

against that deposit, one for \$28,000 and one for \$16,000. They were paid against that deposit.

Q. And then you went back up to the original deposit of \$28,000 and \$16,000, isn't that correct, and stamped in there "error" also?

A. No, that isn't so on mine.

Q. Right here. (Indicating on document.)

A. That was a different date altogether.

Q. The same transaction, though, isn't it, arising out of the same thing?

A. It is probably the same thing.

Q. All we are doing in effect is talking about just paper transactions back and forth and the bank never actually paid out one cent on any of these checks, did they?

A. They did here on April 30th.

Q. You say now that you paid the Bank of Hawaii [92] \$28,000 and \$16,000, is that right, on April 30th?

A. Apparently it was so.

Q. No, I don't mean apparently. Did you or didn't you?

A. Yes.

Q. You say yes now? Now, I am going to hand you the photostatic copy and ask you to compare that with the document you have in your hand and see whether or not they compare favorably or identically? (Handing document to the witness.)

A. Yes, they are.

Q. They are identical?

A. There is just a small little discrepancy here. It doesn't quite come out.

Q. It doesn't quite come out?

A. Yes.

(Testimony of Philip V. Taggart.)

Mr. O'Neill: Your Honor, we would like to offer at this time which would be Defendant's exhibit——

The Court: "A."

Mr. O'Neill: ——"A," which purports to be a photostatic copy of the ledger sheet of the Petroleum Corporation of America with the Seattle First National Bank, Seattle, Washington.

The Court: Well, you say it purports to be. I thought the witness testified that it was a photostatic copy. [93]

Mr. O'Neill: Yes.

The Court: It will be received as exhibit "A."

(The document referred to was received in evidence as Defendant's exhibit "A.")

Q. (By Mr. O'Neill): Just so that I am perfectly clear on this, Mr. Taggart, and that there is no misunderstanding, you are saying now that these items which appear on here, \$28,000 on the left hand column and \$16,000 on the column next to it—— A. Yes.

Q. ——you paid those amounts to the Bank of Hawaii?

A. I can't tell you who we paid them to but they were paid.

Q. Do you know who the checks were drawn on?

A. No.

Q. And these are deposits now which also appear on that ledger card under date of approximately date of approximately——what would that be, April 28th or 29th? A. This is the 28th.

(Testimony of Philip V. Taggart.)

Q. Now, there is one of \$28,000 and \$16,000. Would that be on April 28th? A. Yes.

Q. Now, those particular deposits are stamped in error, is that right? [94]

A. They were posted in error.

Q. Posted in error?

A. By the bookkeeper.

Q. And there was never any credit given on this side of the ledger sheet?

A. Not on that date.

Q. And you go back down to the 30th now and you have got another deposit of \$45,000 on April 30th, is that correct? A. That's right.

Q. So two days after this deposit of \$28,000 and \$16,000 you go back to the 30th before you find the entry actually down here, is that right?

A. Yes.

Q. And these two checks, \$28,000 and \$16,000, is that right? A. That's right.

Q. Now, the Bank of Seattle is not out one cent as a result of this transaction, are they?

A. No.

Q. They have never lost one penny, have they?

A. No.

Q. And still you say they paid 28 and \$16,000?

Mr. O'Neill: That's all, Mr. Taggart. That's all.

The Court: Any redirect, Mr. Conklin?

(Testimony of Philip V. Taggart.)

Redirect Examination

Q. (By Mr. Conklin): Mr. Taggart, with regard to Defendant's exhibit "A," being the photostat that you have been just looking at, when you say you paid out against this account, I think what Mr. O'Neill was getting at was this, that where there may be a credit to this account, just an entry made, credit to this account because of a deposit, likewise there would be a debit against this account because of a check drawn against the account which came in? A. That's correct.

Q. So that what he is getting at, I believe,—and correct me, Mr. O'Neill, if I am wrong—what he is getting at is that the transactions were on the ledger sheet with regard to deposits and with regard to checks drawn against the account but that all of these entries were bookkeeping entries with regard to debits and credits but that as far as hard dollars and cents were concerned the bank did not pay out such sums? A. That's right.

Q. Is that what you are getting at? His point being that the withdrawals made were because of checks drawn against this account which came in, is that correct? [96] A. That's correct.

Q. And that is what happened? A. Yes.

Q. And that is an affair of Mr. O'Neill's—

The Court: Well, that is for the jury to decide, Mr. Conklin.

Q. (By Mr. Conklin): But with regard to such credits and debits, Mr. Taggart, as shown on the

(Testimony of Philip V. Taggart.)

ledger sheet marked Defendant's exhibit "A"—
I will withdraw that question.

Mr. Conklin: We have no further questions.

The Court: Recross?

Mr. O'Neill: No, your Honor.

The Court: You may step down, Mr. Taggart.

(Witness excused.)

NORMAN B. HART

a witness called by the Plaintiff, being duly sworn,
testified as follows:

Direct Examination

Q. (By Mr. Conklin): Would you state your
name, sir? A. Norman B. Hart.

Q. And what is your residence?

A. Arvada, Colorado.

Q. And where are you employed?

A. At the Denver U. S. National Bank. [97]

Q. In what capacity?

A. I am an assistant cashier in charge of the
operations services department.

Q. And when you say operations services de-
partment, would you explain what you mean by
that?

A. These departments are the ones that are con-
cerned with clerical and mechanical work in connec-
tion with the bank checking accounts.

Q. And were you employed in such capacity in
April and May of 1958? A. Yes, sir.

Q. Now, would you explain to the jury what the

(Testimony of Norman B. Hart.)

routine is of your bank with regard to checks? I will withdraw that question. Mr. Hart, would you explain to the jury the routine followed by the U. S. National Bank at Denver with regard to corporate accounts? That is, with regard as to how a corporate account is opened and what procedures are followed?

A. When a representative from a corporation comes into the bank to open a checking account, his first contact is with one of the new account officers. The type of account is discussed, various requirements that must be met; we would have to have a corporate resolution, that is, a synopsis of various events that happened at a Board of Directors, duly constituted Board of Directors Meeting [98] indicating various individuals as officers of the corporation and their several authorities, that is, as to whether they can borrow money, whether they can draw checks, whether they can make deposits. After such a form is prepared, the corporation seal is affixed. Money is placed on deposit in the bank for their credit and the checking account is opened. Usually at that point the signature cards are delivered to these officers and they are either signed in the bank or taken out and returned. When we receive those, why, the account is opened.

Q. Now, calling your attention to April and May of 1958, did the Petroleum Corporation of America have an account in the U. S. National Bank of Denver?

A. Yes, sir, it had two accounts.

(Testimony of Norman B. Hart.)

Q. And was there on file such corporate resolution and cards as you have described for that account?

A. There were two accounts, yes, there were on file such resolutions and cards.

Q. And in April and May of 1958, was there an account in the U. S. National Bank at Denver in the name of B. A. Williams II? A. Yes, sir.

Q. And do you have the original of the ledger sheets for that personal account with you?

A. No, I do not. [99]

Q. You do not? Why not?

A. In the posting system that the U. S. National Bank followed at that time we did not retain an original copy of the ledger sheet. We posted the several debits and credits for a customer, photographed the ledger sheet and mailed it along with the returned checks to the customer.

Q. Well, what is retained by the bank?

A. Photostatic record.

Q. A photostatic record? A. Yes.

Q. And do you have the bank's photostatic record for the account of B. A. Williams covering the period April and May, 1958?

A. Part of May, April and part of May.

Q. And do you have that with you?

A. Yes, sir.

Q. Could we see it?

A. There are actually two that cover this period. (Handing documents to Mr. Conklin, which Mr. Conklin shows to Mr. O'Neill.)

(Testimony of Norman B. Hart.)

Q. (By Mr. Conklin): Showing you a photostatic copy of a sheet purporting to be the ledger account for B. A. Williams II, commencing with the date of April—was that April 28th?

A. April 26th. [100]

Q. April 26th? And ending May 15, 1958. Is this a copy of the photostat which you have in your possession?

A. Yes, sir.

Q. It is a correct copy?

A. Yes, sir.

Mr. Conklin: We would offer this in evidence, your Honor.

The Court: There being no objection, it will be received as exhibit 28.

(The document referred to was received in evidence as Plaintiff's exhibit number 28.)

Q. (By Mr. Conklin): Now, with regard to that account in your bank in April and May of 1958, Mr. Hart, did the bank have any credit arrangement with this account of Mr. B. A. Williams II?

A. Well, if you mean by credit arrangement, did we honor over-drafts on this account, no.

Q. You did not? And handing you Plaintiff's exhibit number 28, Mr. Hart, what was the cash balance on Mr. B. A. Williams II account on April 30, 1958?

A. \$7.82.

Q. And what was the balance on May 14, 1958?

A. \$6.60.

Q. Do you have in your possession the signature card for this particular account we are discussing, the [101] account of Mr. B. A. Williams II?

A. Yes, sir.

(Testimony of Norman B. Hart.)

Q. Could you produce it, please? Do you have a copy of it, too?

A. Yes. (Handing document to Mr. Conklin, which Mr. Conklin shows to Mr. O'Neill.)

Mr. O'Neill: Did you offer these?

Mr. Conklin: Yes.

Mr. O'Neill: Are you going to?

Mr. Conklin: Yes. Your Honor, we offer the photostat of such signature card furnished to me by the witness, Mr. Hart, in lieu of the original.

Mr. O'Neill: Your Honor, I believe that the statements that are contained on this by the bank or by somebody, or whoever they are, as to what they are, stamped or not, it is nothing but an attempt to create some form of prejudice as against the Defendant. We are perfectly willing to agree that Mr. Williams had the account and that his signature, without any such things as these being introduced—they are attempting to prejudice the Defendant's rights in the case. We are willing to agree that Mr. Williams had the account and that is his signature.

Mr. Conklin: Very well. We will so stipulate and we will withdraw the offer.

The Court: Very well. Ladies and gentlemen [102] of the jury, I think I have advised some of you before but I will advise all of you now that when counsel stipulate to certain facts, as they just did, that is evidence which must be accepted by you.

Mr. Conklin: No further questions.

(Testimony of Norman B. Hart.)

Cross Examination

Q. (By Mr. O'Neill): Mr. Hart, referring specifically to the exhibits which you have identified as being Plaintiff's exhibit number 28, does that show any check in the amount of \$50,000 that was received by the U. S. National Bank or a check in the amount of \$1,000? A. No, sir.

Q. It doesn't show any over-draft or anything there either, does it? A. No.

Mr. O'Neill: That's all, Mr. Hart. Thank you.

The Court: Just a moment. Is there any re-direct, Mr. Conklin?

Redirect Examination

Q. (By Mr. Conklin): Showing you Plaintiff's exhibit number 9, Mr. Hart, which is a check in the amount of \$1,000 drawn on the U. S. National Bank, Denver, Colorado, dated May 12, 1958, I ask you, is there anything that appears on that [103] check showing receipt of a check by Denver National Bank?

A. Yes, there is. On the sticker on the front side of the check—rather, on the front of the check there is a sticker bearing the notation "Insufficient funds," which is a bank form that was applied to the check on its presentment. There is also stamp indicating that the check was protested for non-payment by a Notary Public on the 16th day of May.

Q. Now, when you say there is a stamp, a sticker

(Testimony of Norman B. Hart.)

for insufficient funds put on by the bank, which bank are you referring to?

A. By the U. S. National Bank.

Q. Showing you Plaintiff's exhibit number 11, which is a check drawn on the U. S. National Bank, Denver, Colorado, dated May 14, 1958, in the amount of \$50,000, I ask you the same question, was that check received by the U. S. National Bank of Denver, Colorado?

A. This check bears the same sticker, indicating that it was presented to the bank and returned for insufficient funds.

Mr. Conklin: No further questions.

Recross Examination

Q. (By Mr. O'Neill): Mr. Hart, on these forms that you are talking [104] about, where does it say U. S. National Bank or Denver National Bank?

A. It doesn't say it.

Q. It doesn't say it? That is a common form used by a lot of banks, isn't it? A. No, sir.

Q. They all use the same thing, stamp and sticker, don't they? A. No, sir.

Q. Everyone is different? Or everyone is individual, do you mean?

A. That particular one bears the U. S. National Bank form on it and I don't think any other bank can use it.

Q. But there is nothing that says U. S. National Bank on there? A. Literally—

(Testimony of Norman B. Hart.)

Q. Nothing that is printed on there that says U. S. National Bank?

A. Not those words, no.

Mr. O'Neill: That's all.

The Court: You may step down.

Mr. Conklin: Nothing further.

(Witness excused.)

Mr. Conklin: The prosecution rests, your Honor.

The Court: Do you wish to make your opening statement to the jury now?

Mr. O'Neill: There is a matter I would like to take up with the Court, your Honor.

The Court: A motion?

Mr. O'Neill: Yes, sir.

The Court: Do you have any motions to make? If you have any motions to make, you can make them in the presence of the jury and judge, stating the grounds. If the Court desires argument, I will hear it in the absence of the jury.

Mr. O'Neill: May I reserve those motions without any prejudice whatsoever as to the rights of the Defendant, by reserving the right to make those motions at some other time out of the presence of the jury?

The Court: Well, I don't know what rights you can reserve. You have to follow the rules as set forth in the federal rules.

Mr. O'Neill: Your Honor, can I stop on my opening statement and rather than break it up between the opening statement and the testimony, start at one time? As long as the Court is going

to recess at 4:00, I would like to start the first thing in the morning.

The Court: Very well. May I see counsel at the bench just a moment? [106]

(Court and counsel confer at the bench without the presence of the Reporter.)

The Court: Ladies and gentlemen of the jury, again before excusing you, you are instructed not to discuss this case with anyone, allow no one to discuss it with you, avoid reading or hearing anything about it and form no opinions about it. We will start a half hour earlier tomorrow because in all likelihood you may get the case about 1:00 o'clock or shortly after lunch. You are excused until 9:30 tomorrow morning.

(Jury leaves courtroom at 3:52 p.m.)

The Court: This case will be continued until 9:30 tomorrow morning. The Court will adjourn until that time.

(The Court adjourned.) [107]

Honolulu, T. H., February 3, 1959

(Trial resumed at 9:30 a.m.)

The Clerk: Criminal number 11,312, United States of America, Plaintiff, vs. B. A. Williams II, also known as Byron A. Williams II. Case called for further trial by jury.

The Court: Are you ready, gentlemen?

Mr. Conklin: Ready for the prosecution.

Mr. O'Neill: Ready, your Honor. [108]

* * * * *

Thank you very much. Your Honor, I would like to call Mr. Williams.

The Court: Very well.

B. A. WILLIAMS, II

a witness in his own behalf, being duly sworn, testified as follows: [115]

Direct Examination

Q. (By Mr. O'Neill): Be sure when you testify to keep your voice up so that everyone in the jury can hear you. Will you state your full name, please?

A. Byron A. Williams II.

Q. You also use the initials B. A. Williams?

A. I do.

Q. And what is your address?

A. Denver, Colorado.

Q. And your age? A. 29.

Q. I am not certain that they can hear you. Would you keep your voice up? What is your occupation?

A. I am an independent oil producer.

Q. Are you connected with the Petroleum Corporation of America? A. I am.

Q. And for what period and what length of time have you been?

A. I founded the Petroleum Corporation of America on May 29, 1957. It was and still is in existence. I am the President and the sole owner of Petroleum Corporation of America.

Q. Now, talking about the Petroleum Corpora-

(Testimony of B. A. Williams, II.)

tion of America, does that company have any existing oil or gas properties at this time? [116]

A. It does, yes.

Q. Will you describe to the Court and jury where those properties are and what they consist of?

A. We have producing oil wells. We have eight producing oil wells in the State of North Dakota. We have roughly some 17,000 acres of oil and gas leases scattered out throughout the Williston Basin area, through North Dakota, Montana and South Dakota.

In addition to that, we have oil and gas leases in the States of Colorado, Nebraska, Oklahoma, California; also in these various states we have mineral interests where we actually own the mineral rights rather than leases. In other words, it is like owning the whole land except we own just the mineral rights or whatever is derived from any minerals that are produced in these lands.

Q. Buddy, for the purpose of clarifying——

The Court: Would you call your client Mr. Williams?

Mr. O'Neill: Excuse me, your Honor.

Q. Mr. Williams, for the purpose of clarification and in order that the jury will understand your later testimony, would you explain to the Court and jury what is meant by a working interest, referring specifically to an oil and gas property? [117]

A. Well, a working interest is owned by the

(Testimony of B. A. Williams, II.)

people, whether it is a company, an individual, independent or a group of people such as we had in Honolulu, that put up the venture capital to actually drill the well. Now, those particular people or groups of people become the working interest owners. They will derive all of the income from the production with the exception of what the land owner owns himself, which is usually one-eighth. So usually your working interest will be 87 and a half percent of all the oil produced from this particular oil lease.

Now, these working interests, as what we will say Standard of New Jersey, would go out and drill a well. They would actually be the working interest holder. Sometimes they go into partnerships with other companies, other independent operators, and then they jointly drill the well. Well, they own these working interests.

Q. That is what these working interests are, what was sold here in Honolulu, is that right?

A. That is right.

Q. To the various investors here in the islands?

A. That's correct.

Q. Now, going into your background, where were you born?

A. I was born in Ardmore, Oklahoma. [118]

Q. What schools did you go to?

A. I attended East Central State Teachers College, and then I attended the University of Oklahoma.

Q. For what length of time?

(Testimony of B. A. Williams, II.)

A. In '47, '48 and '9.

Q. Did you have any time or did you spend any time in the Armed Forces of the United States?

A. I was in the Air Force, yes.

Q. In what branch or department of the Air Force? A. In the intelligence.

Q. And where were you stationed during that time?

A. San Antonio, Denver, Colorado, and Topeka, Kansas.

Q. What was your father's occupation?

A. He was an oil lease broker.

Q. And he lived in Oklahoma?

A. That is true.

Q. And did business in that part of the country?

A. That's right.

Q. When did you get out of the Air Force?

A. In 1953, I believe it was.

Q. And then what did you do?

A. Prior to going into the Air Force I was buying oil and gas leases for different major companies in the States of North Dakota and Montana. After I received my discharge, I went back to Denver, Colorado, and set up an [119] independent brokerage business there, that I was buying and selling oil and gas leases throughout the Rocky Mountain area.

Q. Mr. Williams, let's go back just a little bit. Would you describe to the jury what you mean by an independent brokerage business? What is a gas and oil broker or gas and oil lease broker?

(Testimony of B. A. Williams, II.)

A. It is very much the same as a real estate broker with the exception that we are dealing in oil and gas leases. The major oil companies will not generally buy these leases themselves, due to areas having particular hot interests; at different times they will not want it known to other companies that they are buying these leases. So they will hire independent brokers such as myself to go out and purchase the leases in my name so that no one else will know that they are buying these leases themselves. And then after I have checked over the title and found it to be satisfactory, then I will make an assignment of this oil and gas lease to the company.

Q. And that is the business that you started up in 1953 in Denver, is that correct?

A. That is true.

Q. Now, will you go ahead and describe what you did and how things went after that?

A. Well, in 1953 and '54 and '55 my business grew considerably in Denver. I was handling accounts for several [120] of the major oil companies there. And also at that time I had accumulated quite a bit of money and I was buying oil leases for my own account. Due to a tax position or a tax situation, the government will allow you to deduct drilling expenses on drilling these oil wells. So at that time I started, because of making this money in the lease business, I started drilling oil wells on my own. I did that through, well, I

(Testimony of B. A. Williams, II.)

started actual drilling on my own actually in 1955, which I have continued to do until now.

Q. When did you come to Honolulu?

A. I came to Honolulu in November of 1956.

Q. And why and what was the purpose for it?

A. I had some people to see over here, and also at that time I had an aunt that was living here.

Q. In Honolulu? A. Yes.

Q. How did you get started in this brokerage business or lease business over here in Honolulu, the sales?

A. Well, I went to dinner with my aunt and her former husband, Mr. Ranieri, and met several of their friends and acquaintances and I was here for about at that time, about two weeks; during the course of conversations, why, people would inquire about the oil business and the tax advantage associated with it. And through [121] these conversations they encouraged me to open an office here for the investors here and start investing.

Q. And you did that? A. That is true.

Q. And these interests were sold out here, is that right? A. That's right.

Q. And I believe you stated in May of 1957 the Petroleum Corporation of America was formed, is that right? A. That is true.

Q. What was the purpose for that?

A. Well, during the first six months of 1957 I was operating these properties under my own name as an individual, as I had done on the mainland with the other companies. But due to an excessive

(Testimony of B. A. Williams, II.)

amount of travelling and I was having to do by coming over here on commercial liners, and then at that time we had a private plane that I was using to go up to in North Dakota to see the property up there, the investors asked that something be done in order to protect their interest in the event of my death. So a corporation was formed so that in the event something happened to me their interest would still be protected and it wouldn't have to go through any estate and have legal problems. [122]

Q. Now, when Petroleum Corporation of America was formed, who were the officers of it and how was the company conducted and carried on and where were its offices?

A. When it was formed, I was spending a great deal of my time in Honolulu, so I acquired the services of a man who was an attorney by education and actually had been in the oil business some 17 years for the Shell Oil Company. I knew that I would be out of town a great deal and I needed someone to run the operational part as far as letting contracts, getting the wells drilled, buying equipment, and in general running the oil part of the business. He at that time was elected President of the company.

Q. Who is that? A. I beg your pardon?

Q. Who was that?

A. That is Alfred R. Thomas. We had a Secretary and Treasurer of the company who at that time was my attorney by the name of Leo W.

(Testimony of B. A. Williams, II.)

Kennedy. The principal offices were set up in Denver as far as running the actual oil business. The investors' part was handled through Honolulu. We had an office here.

Q. And there was an office maintained in Denver, Colorado, is that right? A. That is true.

Q. Now, did you ever have any conduct or any connections with a man by the name of Gates with regard to the Petroleum Corporation of America?

A. Yes, we did. When we started actually [123] finding the oil and putting the wells in production, we had to make a considerable amount of purchases as far as the equipment, such as the pumping jacks, the tanks to hold the oil, the casings to go in the wells and all of the tangible equipment. So Mr. Gates came to me and he had had that experience and wanted the contract to furnish these supplies for us. In other words, he would go out and buy from all the different suppliers and then sell to us as being one supplier. So in order to save a lot of time and personnel, by hiring additional personnel to handle all that, I went ahead and let him have the contract to furnish this equipment for our wells.

Q. And did he do that? A. Yes.

Q. And did you pay him?

A. Yes, we did. We paid him in excess of \$325 or \$30,000 over a period of a year, a year and a half.

Mr. Conklin: Your Honor, I am sorry to interrupt, but we question the relevancy of this whole

(Testimony of B. A. Williams, II.)

line of testimony. And, therefore, we would object to any continuation of it. I can't see that it is in any way relevant.

The Court: Well, there is nothing before the Court now. But I think you have about covered your background, have you not? [124]

Mr. O'Neill: Yes.

The Court: Very well. Proceed.

Q. (By Mr. O'Neill): Now, going into the latter part of 1957, the early part of 1958, where were you at that time?

A. Well, I was spending my time between Denver, Honolulu, and North Dakota.

Q. Was Mr. Thomas still active in the company at that time?

A. He was until the first part of December. And at that time a serious back injury that he had in the years past started giving him some trouble so he had to go into the hospital and have an operation. He had the operation. However, he had been in bed since then. It has been a little over a year. And at that time I had to take over the operation of the company.

Q. What was the condition of the company or what was going on at that time that you took it over?

A. Well, at the time I thought everything was all right, until some of these liens started being filed because this man that we had given the contract to to furnish the equipment, he was paid in full, but he failed to pay his suppliers. So conse-

(Testimony of B. A. Williams, II.)

quently they in turn came back against the property. When I found that out is when I [125] became very disturbed because they had paid him in excess of \$300,000 and it hadn't all gone to the suppliers. So our property at that time became in jeopardy.

Q. By these liens being filed, what actually happened by these liens being filed?

A. Well, when the supplier is not paid for his services or supplies, he can file a lien which in effect ties up your property. He files it in the court house and keeps you from selling the property or receiving any income from it.

Q. And that is what happened then?

A. Yes.

Q. In 1958, the early part of that, is that right?

A. Yes.

Q. Now, did the Petroleum Corporation of America have occasion during 1958 to establish an office in Seattle, Washington?

A. Yes, we did. After I found out that these bills had not been paid and our property was going to be in trouble if we didn't come up with the money, I at that time decided to sell some of our interest that we had retained in the sales from Honolulu. In other words, we owned interest in actual producing wells. Through an acquaintance I had of an oil man in Denver by the name of Doing—he knew a state senator and attorney in Seattle, Washington, and we made the trip to Seattle, contacted him, and he agreed [126] to open the office

(Testimony of B. A. Williams, II.)

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(Testimony of B. A. Williams, II.)

for us in Seattle and do the actual selling of the interest because he knew the people and we did not.

Q. What was his name? A. Ralph Purvis.

Q. That is the senator, attorney that you are talking about? A. Yes, sir.

Q. Was he connected with the firm or connected with the company in Seattle?

A. He was much the same as Mr. Ranieri was here. He was our resident manager there and actual salesman. He did the selling.

Q. Now, referring specifically to April in 1958, last year, did you have occasion to talk with Mr. Doing at any time during that early part of April?

A. I did. We opened the office in Seattle, in the early part of April, and Mr. Doing was spending some time there, practically all of the time. I would go in maybe once every week or so. And Mr. Doing would report to me when he had made a sale. And at that time I would instruct him what to do with the money.

Q. Now, referring specifically to these bank accounts, will you explain to the jury and the Court how these bank accounts were maintained and kept and the purpose of them? [127]

A. We had our operating account at the U. S. National in Denver. We had the investors' account in the Bank of Hawaii here. When we opened the office in Seattle, we opened an account there mainly to process the checks before they would be sent

(Testimony of B. A. Williams, II.)

elsewhere. And we opened that account in Seattle First National.

Q. And where were the books and records of the company kept?

A. They were all kept in Denver.

Q. In the main office in Denver, Colorado, is that right? A. Yes.

Q. Now, did you talk or have occasion on or about April 24th to talk or be in contact with Mr. Warren P. Doing?

A. Yes. He called me, advised me that some 45 or \$6,000 worth of interest had been sold and he was going to collect the money and he wanted instructions as to what to do with the money.

Q. And what did you tell him to do?

A. I advised him to go ahead and deposit it in the Seattle First National Bank, and then I would transfer it on over to Honolulu so that we could cash it out from there.

Q. And that is what was done, is that right?

A. That's right. [128]

Q. And do you remember approximately when it was that he told you he was going to make this deposit? A. It was on April 24th.

Q. Of 1958, is that right?

A. That's right.

Q. And then what did you do after that?

A. Well, due to all of these people in Denver wanting their money through various things on the wells and investment and leases, they were continually hounding me for their money, naturally.

(Testimony of B. A. Williams, II.)

So when he advised me that he had the money collected and I told him what to do with it, then I started writing checks to these people so they could get their money.

Q. Now, to whom were these checks written and on what account?

A. Well, the largest check was made payable to a Jim Green in Colorado Springs. I believe it was 26 or \$27,000. That check was the second payment on a shopping center that we had acquired. The original payment was \$10,000. This other money had to be paid to his bank so that they could close out the loan against this property because we had already built this supermarket. And the bank was naturally wanting to get the loan closed before [129] their examiners came in and found this outstanding loan.

Q. Now, was that check drawn on the Bank of Hawaii? A. Yes, it was.

Q. The Petroleum Corporation of America account? A. Yes.

Q. Here, is that right? A. Yes.

Q. Now, that was to be money which was represented by the sales of Petroleum Corporation working interest, is that right? A. It was.

Q. And it was on that basis that you wrote those checks and asked Mr. Ranieri to make this deposit? A. Yes.

Q. And what had been assured you in Seattle, is that true? A. That is true.

Q. Now, going on just a little bit, can you enu-

(Testimony of B. A. Williams, II.)

merate and try to list as best you can to this jury to whom were these checks paid and what was the purpose to use this money for?

A. Well, that was one item. There was another item, \$5,000, that was paid to T. N. Jordan. We had during the year bought some \$116,000 worth of oil and gas leases for Mr. Jordan. This \$5,000 was the final payment to get these [130] leases released from the bank. They were tied up over at the U. S. National in the collection department. And this was the final payment to release them, the reason being that I wanted to get the leases out of the bank so that we could proceed to sell them.

There was another item on there for \$5,000 paid to Fred Wallace of Boulder, Texas. We, through some of the investors in Honolulu, were proceeding to drill some wells in Texas. This was the initial payment on one of those wells.

There was another check for \$1,100 to a K. B. Well Service out of North Dakota. They had gone in and done some reworking on some of our wells up in North Dakota.

There was, I think, a \$650 check to my father which was money that the company had borrowed from him and we were returning that.

Q. Can you think of any others?

A. No, that's all.

Q. That pretty well covered this amount that was supposed to have been deposited in Seattle, is that right?

A. I believe it did, yes.

(Testimony of B. A. Williams, II.)

Q. Go ahead and just tell the Court and jury exactly what happened after that, what you did?

A. Well, when Mr. Doing advised me that this \$46,000 was going to be deposited, I, of course, drew [131] these particular checks that I just told you about. Well, two or three days later he called me and advised me that Mr. Purvis had been over to the Washington Securities office and they had found that we should register our securities with them. So I contacted our attorney in Denver and had him proceed and get whatever information was required and sent it on. The information was compiled and sent up there and sent up to Washington. At that time Mr. Doing hired a local firm in Seattle to look at the information and prepare it to turn over to the Commission. So he advised me that the delay was going to be until we could get these papers filed. Well, naturally, I was concerned because I had these checks out to these people and drawn against this account. So at that time I went out to California to see an uncle that I had out there about borrowing the money from him. And, of course, I knew that time was running and I was afraid that the checks would go back, insufficient funds. So I had Mr. Doing deposit some checks drawn against the Bank of Hawaii. And what I was trying to do is keep these checks from going back until I could get in money raised, until I could get this money raised. Well, I got out to California and I had borrowed a considerable amount from my uncle before on various

(Testimony of B. A. Williams, II.)

deals that he was going in with me, and I got out there and he had already started on a venture and [132] his money was tied up. So I spent about four, five days with him attempting to either borrow the money or make some arrangement on it in Los Angeles. And then we found out that it was going to be too long so I think I might have gone up to Seattle. I was travelling around quite a bit trying to sell these leases that we had.

We had just paid Jordan \$116,000 for leases. We had an additional, we bought an additional \$42,000 worth of leases from the State of North Dakota. I was attempting to sell all of them or do anything to get this money. So I was doing what is in the course of this, was trying to keep these checks from going back, insufficient funds.

Q. And that is what was happening during this entire time, is that right?

A. Yes, that's right.

Q. Who were you attempting to sell these leases to? Or how were you doing that?

A. Well, I know my telephone bill will show it, that I called just about every lease broker in the Rocky Mountain area, major companies, in an attempt to sell these leases. At that particular time there was some kind of a crisis in the country and everybody was deciding they weren't going to make substantial purchases. And that was one of the reasons we couldn't sell the leases. [133]

Q. So what did you finally do then?

A. Well, I went—what I was going to do—well,

(Testimony of B. A. Williams, II.)

let's see—there was two checks for \$25,000 apiece that had been made payable to the corporation and drawn on the bank, I believe it was the Bank of Seattle. I could see that this situation was not going to be resolved, so I felt—I didn't put any more checks in the bank. Well, they came back insufficient funds. So I called Ranieri over here. I was in Denver at the time, I believe. And I called him and I told him that the deal in Seattle was going to take too long, we weren't going to be able to get the money there, so what to do was—he had some checks of mine here—so I told him to draw one against my personal account, go over to the bank and tell them those checks were coming back and to give him this. So that they would have something on their ledger sheets rather than overdrawn account, and that I would try to cover that check by the time it got to Denver.

Q. And that was this last check on the U. S. National Bank?

A. That was the last check for \$50,000 drawn against my personal account.

Q. About when was that, do you remember?

A. That was towards the end of May. I don't know. [134]

Q. And then what happened after that? What did you do?

A. Well, I don't remember the exact date on that. My father died June 1st and I went down to Oklahoma and after that I came over here and talked to Mr. Kenske. I told him that we had got-

(Testimony of B. A. Williams, II.)

ten all fouled up on the thing, that there certainly wasn't any intent to get any money because I didn't get any. And I was doing everything possible to get the bank back their money.

Q. And you did that, is that right?

A. That is true.

Q. Did you borrow that money to pay it back?

A. I borrowed it, yes.

Q. Signed personally for it?

A. That's correct.

Q. And then it was all repaid in full to the Bank of Hawaii?

A. It was, towards the end of June.

Q. And were you contacted by the Postal Inspectors at any time during this period of time?

A. No, I was not. I got ahold of \$2,500, I believe it was, which I wired to the bank from Denver. While over here, I believe I got in here on Saturday or Sunday, I talked to Mr. Klenske on Monday—Monday and Tuesday maybe—and then along about Thursday one of our investors came in [135] with some money that he had owed on a previous deal. It was \$2,850. I called Mr. Klenske and told him that I had the check from the investor and asked him if I should bring it over, and he said, no, that he would send a messenger over. So he sent a messenger over and picked up the check for \$2,850. So at that time we were over-drawn \$50,000. So this reduced it with the \$2,500 I had wired from Denver and with this \$2,850, it reduced it, I think it was about \$46,000 over-drawn.

(Testimony of B. A. Williams, II.)

Q. And it was after that that you were contacted by the Postal Authorities, is that right?

A. Well, it was that afternoon. He and the U. S. Marshal walked into the office.

Q. But none of the time during any of these things were going on that you have related here were you ever contacted by any Postal Authorities or any law enforcement agencies?

A. None whatsoever.

Q. Until after this was all ended and the bank got its money back? A. That's right.

Q. And they were subsequently paid shortly after that?

A. I did know this, that they reviewed the situation because Mr. Klenske told me after he got in the bank that [136] he had been talking to them. So I did know that they were examining the situation. But I felt that I certainly hadn't done anything wrong and I was trying to repay the money which I was doing. I had paid them some. I didn't feel——

Q. Did you ever obtain anything at all from the proceeds of these checks yourself?

A. Actually no, because there was other money put in all of these accounts during this time. We opened the account in Seattle with \$5,000 of our own money. And I bought about \$4,000 worth of furniture and office equipment to open this Seattle office with. Of course, all the travelling expenses. So actually I didn't derive anything out of this 50,000, no.

(Testimony of B. A. Williams, II.)

Q. Out of the entire thing? A. No.

Q. At any time that these checks were deposited in this bank, did you ever draw any money against these checks in the Seattle National Bank, Seattle First National Bank?

A. Well, we had various funds going in the Seattle First National.

Q. No, I mean, you didn't write any checks for \$50,000 against the Seattle Bank on these uncollected funds? A. No. [137]

Q. And the Bank of Hawaii is the only one that allowed that over-draft and that was paid in full, is that right?

A. Yes. The reason they did is, we had from time to time put a considerable amount of money in the Bank of Hawaii. And during all this time I was in the mainland and Ranieri would call me that this money was going to be picked up that afternoon or the next morning and we had suppliers going; at one time we were drilling more wells than any operator in North Dakota; we were spending an awful lot of money every day. And I had people calling me for checks. So when Ranieri would advise me that the money was going to be put in, I would go ahead and pay it out. It was drawn against the bank—well, numerous times the bank would call in the morning and say that there were some checks in for maybe 10 or 15 or \$20,000, and Ranieri would say, well, I just made a deposit this morning, which was not on the books. So the bank's position was, this had happened and it had

(Testimony of B. A. Williams, II.)

always been made good before, that is why the thing happened.

Q. Now, during this period of time, during 1958, when these liens that you have discussed and mentioned here were filed, did that tie up the production money or production account of the Petroleum Corporation of America? [138]

A. Yes, it did.

Q. In other words, that just shut off all the money coming into the company?

A. It did. I talked to the refinery one day and asked them about our production check. As I say, we were spending a lot of money. We asked him about the production check, we asked them about it. They said they were going to send it out that day. And then they got these liens in the mail that day and so consequently they didn't send our check.

Q. The only income that the Petroleum Corporation of America had or the only income that the investors had from these wells would be from these refineries, is that correct? A. Yes.

Q. And when these liens were filed, it would naturally tie up all of the money?

A. It tied up all of the money, yes.

Q. And they are still tied up as a result of that situation?

A. \$100,000 tied up right now.

Q. And that is the investors' money and Petroleum Corporation money, when these law suits and everything were settled, is that right?

A. That is true. [139]

(Testimony of B. A. Williams, II.)

Q. And did you ever at any time during this whole transaction ever intend to cheat or defraud anybody in connection with this?

A. I certainly did not.

Q. You did everything you possibly could to keep them advised and let them know what was going on in the situation?

A. I did. I called Ranieri up everyday during the course of this situation and told him to do different things, to call Mr. Klenske and advise him that we certainly weren't running out on anybody. It was an unfortunate situation that happened and we were going to get it straightened out as quickly as possible, as quickly as we could.

Q. And eventually it was done?

A. That is true.

Q. But you were the only one in the company that was doing anything at that time?

A. That is right. Mr. Thomas was in the hospital and I was the one that was running the whole company.

Q. The thing, everything was thrown on your shoulders at that time?

A. That's right.

Mr. O'Neill: That's all. Thank you.

The Court: Cross examination? [140]

Cross Examination

Q. (By Mr. Conklin): Mr. Williams, you stated on direct examination that after Mr. Doing had told you that this money would be deposited that

(Testimony of B. A. Williams, II.)

you started to write checks because these people were hounding you for money, is that correct?

A. Yes, sir, that's right.

Q. I may not have the names right but the names aren't that vital. There was a big check for 26 or \$27,000 to Green, and 5,000 to a fellow by the name of Jordan, and 5,000 to a fellow by the name of Wall, 1,100 to the K and B Wells Service, \$650 to your father. Now, these were all debts of the Petroleum Corporation of America on its previous activities? A. Yes.

Q. And you stated on direct examination that after Mr. Doing had told you about this 45 or \$46,000 that would be available, that the Securities and Exchange Commission of the State of Washington said that you had to register before you could sell any of these working interests, is that correct? A. Yes, sir.

Q. And as far as the sale of the working interest in Seattle, those were, as I understand from your direct testimony, those were working interests which belonged [141] to the Petroleum Corporation of America, is that correct? A. Yes.

Q. And Mr. Doing had told you about the sale of these interests about April 24, 1958?

A. This particular item, yes, we had made sales prior to that time which he had deposited the money in the bank. He had actually gone ahead and collected.

Q. Sales of working interest? A. Yes.

(Testimony of B. A. Williams, II.)

Q. Well, how could you have sold working interest if you didn't have it with the F.C.C.—

A. It was after that that we went to the F.C.C. and found out that we had to.

Q. That you were supposed to? A. Yes.

Q. I see. But these various items, you said, since people were hounding you for money you started writing checks and they were items that you wrote knowing that Mr. Doing had said that the \$46,000 was going to be deposited? A. That is true.

Q. Now, if that money that Mr. Doing told you was going to be deposited represented sales of Petroleum Corporation of America assets, why did you have Mr. Ranieri deposit \$44,000 to your personal account in the Bank of Hawaii? [142]

A. Well, Mr. Conklin, I am the Petroleum Corporation. It doesn't make any difference. I own the corporation. And some things are done in my name personally and some things are done in the corporate name. This was done for convenience. I travel around the country a great deal and, naturally, I can't be in these offices all at the same time when this money comes in. So I leave signed checks in blank in these offices and then over the telephone wherever I am I instruct the office people what to do with these checks, what to do with these checks.

Q. That's fine. I understand that. As the sole owner of the business? A. Yes, sir.

Q. But you have testified that you wrote a check to this man Green for 26 or \$27,000, \$5,000 to Jor-

(Testimony of B. A. Williams, II.)

dan, \$5,000 to Wall, \$1,100 to the Wells Service and about \$650 to your father. All right. Let's say that's 26,000 plus 10 which is 36, that is 37, about \$38,000 out of the 46. A. Yes.

Q. And you said these were all corporate debts. Did you write all these out of your personal account or out of the corporate account?

A. I believe those were written out of my personal account. As I say, it makes no difference.

Q. Your personal account where? [143]

A. At the Bank of Hawaii.

Q. Your personal account at the Bank of Hawaii? So that shortly after April 24, 1958, you had written a check to a man named Green for 26 or \$27,000, a \$5,000 check to a man by the name of Jordan, \$5,000 check to a man named Wall and \$1,100 check to K. B. Well Service, and about \$650 to your father, is that correct? And then because of those checks written on your personal account in the Bank of Hawaii, you had Mr. Ranieri deposit \$44,000 in your personal account, is that correct? Is that right? A. Yes.

Q. Now, I hand you a check dated April 11, 1958, showing a signature purporting to be your signature on a check. Is that your signature? (Handing document to the witness.)

A. Yes, it is.

Q. And it is drawn on the Bank of Hawaii, isn't that right? A. Yes.

Q. And it is for \$500? A. Yes, it is.

Q. And who is that to?

(Testimony of B. A. Williams, II.)

A. That is payable to T. N. Jordan.

Q. That is for \$500? And I show you a check dated April 24, 1958, purportedly bearing your signature and I [144] ask you is that your signature? (Showing a document to the witness.)

The Court: That is a nice conversation you are having there but the jury wants to hear the questions. You tend to get softer when you get closer to the witness.

Mr. Conklin: I will repeat that.

Q. I show you a check dated April 14th, 1958, purportedly bearing your signature, and I ask you is that your signature? A. Yes, it is.

Q. It is? And the check is payable to Jim Brown? A. Green.

Q. And the amount of the check is \$27,520.09?

A. That's right.

Q. And that is drawn on your personal account at the Bank of Hawaii, isn't that correct?

A. Yes.

Q. That is April 14th? I show you a check dated April 17, 1958, and I ask you, does that check bear your signature? (Showing a document to the witness.)

A. Yes, it does.

Q. And that check is payable to K. B. Wells Service and that is for \$1,100? A. Yes, sir.

Q. All right. I show you a check dated [145] April 22, 1958, and ask you, does that check bear your signature? (Showing a document to the witness.) A. Yes, it does.

(Testimony of B. A. Williams, II.)

Q. It does? And this check is for \$25 payable to the Exetor Hotel, is that right?

A. That is true.

Q. I show you a check dated April 25, 1958, and ask you, does that bear your signature? (Showing a document to the witness.) A. Yes, it does.

Q. And that check is payable to the Montclair Insurance Company or Investment Company?

A. For \$50.

Q. For \$50? And there is a notation on that check "Deposit Apt 605"? A. That's right.

Q. I show you a check also dated April 25, 1958, which is payable to J. H. Ware. Is that what it is?

A. Yes, I believe that is dated April 29.

Q. April 29? Does that contain your signature?

A. Yes, it does.

Q. And that is for how much? A. \$500.

Q. I show you a check dated April 25 and I ask you, does that check bear your signature? (Showing a document to the witness.) [146]

A. Yes, it does.

Q. And who is that payable to?

A. That is payable to my father.

Q. To your father, and that is for \$650—right?

A. Yes.

(Counsel confer.)

Mr. Conklin: Your Honor, we offer the check dated April 11, 1958, payable to Mr. T. N. Jordan in evidence.

The Court: I noticed stamp marks and that there is no room for an exhibit number.

(Testimony of B. A. Williams, II.)

Mr. Conklin: Yes, your Honor, there are several that way.

The Court: I would suggest that they be received as a group, as 29-A—how many are there?

Mr. Conklin: I have four here.

The Court: A, B, C and D. And that we pin them together. Pin them together, Mr. Thompson.

Mr. Conklin: The checks are April 11th, the one I just gave, April 17, 1958, payable to K. B. Wells Service, April 14th payable to Jim Green, April 22nd payable to Exetor Hotel.

The Court: They will be received as exhibit 29-A, B, C and D. [147]

(The documents referred to were received in evidence as Plaintiff's exhibit 29-A, B, C and D.)

Q. (By Mr. Conklin): Showing you Plaintiff's exhibit 29-C, which is a check dated April 14, 1958, payable to Jim Green in the amount of \$27,520.09, and referring you to Plaintiff's exhibit number 12, which is a ledger sheet for your personal account in the Bank of Hawaii, would you please read off to the jury what the balance was in your account on April 14, 1958? (Handing documents to the witness.)

A. There is no date of April 14th on this sheet.

Q. All right. What is the earliest date before April 14th?

A. Well, there is one on April 8th.

Q. What was the balance on April 8th?

A. \$2,284.88.

(Testimony of B. A. Williams, II.)

Q. What is the earliest date of entry after April 14, 1958?

A. There is another one, April 18th; balance is \$134.99.

Q. Now, with regard to these sales in Seattle of your working interest, didn't you work with Mr. Doing in talking to prospective purchasers about sales in Seattle?

A. Yes, I made two or three trips up there and talked with different people.

Q. Isn't it true that on April 24, 1958, there had been no agreement signed with any potential investors or any potential purchasers of working interest?

A. I don't actually know for sure. If you are referring to this \$46,000, no, they were not signed up on April 24th.

Q. They were people who had verbally said they were interested in buying?

A. That is exactly right.

Q. And did Mr. Doing inform you that on the telephone when he called you? A. He did.

Q. So that rather than Mr. Doing saying that he had deposited or was that day going to deposit \$46,000, what he told you on the telephone was that he thought that he would be able to sell about \$46,000 worth of interest in the next several days, isn't that right?

A. No, sir. I beg to differ with you. He told me he had them sold. That was much the same as we had the operation out here. Mr. Ranieri would tell

(Testimony of B. A. Williams, II.)

me he was going out to pick a check and he was going out to pick it up.

Q. He told you that he had them sold on oral representation? [149]

A. Certainly. If somebody tells you that they are going to buy something, you expect it to be good. It always was over here.

Q. Was that sale of working interest on about that time, was that ever consummated?

A. No, because we weren't—

Q. The \$46,000 was never received?

A. We would not conclude the deal because of this F.C.C. situation.

Q. And was the \$46,000 or any portion of it ever paid right up to this minute?

A. Whether we are talking—

Q. The sales in Seattle.

A. —there was some money received there, yes.

Q. Were these working interests ever sold in Seattle? A. Not after that time, no.

Q. And did the Petroleum Corporation of America subsequent to April 24th or a few days thereafter—let's say the month of April, 1958—down to February 3rd, 1959, has it ever qualified to the Securities and Exchange Commission of the State of Washington?

A. No, because we closed the office.

Q. When did you close the office?

A. I don't recall. [150]

(Testimony of B. A. Williams, II.)

Q. Wasn't it in May, 1958, one month after you opened it?

A. No, it wasn't. It was after all this mess came out over here.

Q. Wasn't that in May of 1958?

A. That was in May and June.

Q. May or June of 1958?

A. That's right.

Q. Either one month or two months after?

A. We found out it would be too expensive to qualify and decided not to.

Q. Decided not to? You stated on direct examination that your attorney in Washington was a man named Mr. Purvis, isn't that right?

A. Would you repeat that?

Q. Well, I may have made a mistake in saying that he was your attorney.

A. That's what caught me. He is an attorney but he was not representing us as such. He was our sales manager.

Q. Yes. It was my fault. I said he was your attorney. You didn't say he was your attorney. You said he was your manager in Seattle. Is that correct?

A. That's correct.

Q. Now, what was Mr. Doing's position? [151]

A. He was in effect co-manager with him because he had the oil experience that Mr. Purvis did not. So he would explain the oil terms to the investors along with Mr. Purvis.

Q. Wasn't Mr. Doing working on a commission basis?

A. Yes, he was.

(Testimony of B. A. Williams, II.)

Q. Wasn't Mr. Doing going to be entitled to receive a commission on that \$46,000?

A. Yes, he was.

Q. So that there wasn't \$46,000 available to you on April 24th or a few days thereafter? From the \$46,000 would have to be deducted 50% payable to Mr. Doing, is that correct?

A. Mr. Doing owes me quite a bit of money to this day.

Q. On or about April 24, 1958, with regard to the \$46,000, isn't it true that Mr. Doing, if that \$46,000 had ever been received, that Mr. Doing would have been immediately entitled to take out 50% of it? A. 50%?

Q. Yes. A. For what?

Q. As his commission.

A. I have never heard of anybody getting 50% commission in my life. [152]

Q. What was his commission?

A. His commission was 5%. And, as I said, Mr. Doing owed me a considerable amount of money so he was not entitled to take any money out.

Q. So that if the \$46,000 had been received, Mr. Doing would have been entitled to receive \$2,300?

A. He would not have been. That would have been a credit for what he owed me, yes, that is true. Actual cash, no.

Q. Mr. Doing owed you a lot of money at that time? A. Yes, he did.

Q. And he still owes you a lot of money?

A. He still does, yes.

(Testimony of B. A. Williams, II.)

Q. And how long had you known Mr. Doing in April 1958?

A. I had known him since 1952.

Q. When you were in the military?

A. Well, '52-'53.

Q. Because you did testify that you got out——

A. The early part of '53. I met him as soon as I opened my office in Denver or shortly thereafter.

Q. Now, with regard to the Petroleum Corporation of America and its business in Seattle, hadn't Mr. Purvis written you a letter of April 1st, 1958, telling you that the corporation would have to qualify in the State? [153]

A. I don't recall.

Q. You don't recall?

A. You mean qualify to do——

Q. To do business.

A. ——to do business? Our attorney—I know that we naturally had to qualify in any State that we do business, and the papers were drawn and sent.

Q. You remember Mr. Purvis writing to you on April 1st, 1958, to that effect?

A. I don't remember. Undoubtedly he did.

Q. Would you recognize a letter if you saw it again? A. Certainly.

(Mr. Conklin shows a document to Mr. O'Neill.)

Mr. O'Neill: If he intends to introduce this in evidence, we have no objection to it, with the understanding that this does not refer, so that there is

(Testimony of B. A. Williams, II.)

no misunderstanding, that this does not refer to the Securities and Exchange Commission, which is their own testimony. It has to do with business within the State. Other than that, we have no objection.

The Court: Are you offering it in evidence?

Mr. Conklin: I don't know, your Honor. I was going to show it to the witness. (Handing document to the witness.)

Q. (By Mr. Conklin): Do you recall receiving that letter? A. Yes, I do. [154]

Mr. Conklin: Your Honor, we offer this in evidence.

The Court: There being no objection, it will be received as exhibit——

The Clerk: Exhibit 30.

(The document referred to was received in evidence as Plaintiff's exhibit number 30.)

Q. (By Mr. Conklin): Would you read the salutation and the first paragraph of the letter, Mr. Williams, to the jury?

A. "Dear Buddy:

"In order to qualify your corporation to do business in the State of Washington it will be necessary to supply the Secretary of State of the State of Washington with the following information."

Q. And the letter is dated April 1st, 1958—right? A. Yes.

Q. Had Petroleum Corporation of America qualified to do business in the State of Washington by April 24th, 1958?

A. I really don't know, Mr. Conklin. We quali-

(Testimony of B. A. Williams, II.)

fied in several different States, and I couldn't actually say. [155]

Q. But you were at this time the President of the corporation? A. Yes.

Mr. Conklin: Your Honor, as a group we offer three checks, the first dated April 25, 1958, payable to Montclair Investment Company for \$50; the next check dated April 25, 1958, payable to B. A. Williams for \$650; and the next, the last check, being dated April 29, 1958, payable to J. H. Ware, Junior, for \$500.

The Court: There being no objection, they will be received as exhibit number 31-A, B and C.

(The documents referred to were received in evidence as Plaintiff's exhibit number 31-A, B and C.)

Q. (By Mr. Conklin): Showing you a check dated April 28, 1958, I ask you, does your signature appear on that check? (Showing document to the witness.) A. Yes, it does.

Q. And that check is payable to John and Mary Burton?

A. Abstractors in Santa Fe, New Mexico.

Q. For \$358.50, is that correct? A. Yes.

Q. I show you a check dated May 2nd, 1958, and ask [156] you, does your signature appear on that? (Showing a document to the witness.)

A. Yes, it does.

Q. And that is drawn on the Bank of Hawaii payable to the Bank of Hawaii for \$7,500, is that correct? A. Yes.

(Testimony of B. A. Williams, II.)

Q. I show you a check dated May 2nd, 1958, and ask you, does your signature appear on that check? (Showing a document to the witness.)

A. Yes, it does.

Q. And that check is payable to——

A. L. W. Kennedy.

Q. L. W. Kennedy for \$500?

A. That is true.

Q. I show you a check dated May 5, 1958, payable to——

A. Janoil.

Q. ——Janoil? A. Corporation.

Q. For \$500? A. Yes.

Q. And I ask you, does your signature appear on that check? (Showing a document to the witness.)

A. Yes, it does.

(Mr. Conklin shows documents to Mr. [157]

O'Neill.)

Mr. O'Neill: No objection.

Mr. Conklin: Your Honor, we offer these as a group.

The Court: Five or six checks? How many are there?

Mr. Conklin: Four.

The Clerk: Yes, your Honor, four.

The Court: They will be received as exhibit 32-A, B, C and D.

(The documents referred to were received in evidence as Plaintiff's exhibit numbers 32-A, B, C and D.)

Q. (By Mr. Conklin): Mr. Williams, showing you Plaintiff's exhibit 12, which constitutes your

(Testimony of B. A. Williams, II.)

personal checking account ending May 15, 1958, was your account closed at that time? (Handing document to the witness.)

A. You mean May 15th?

Q. Yes.

A. Not at that time. I don't believe it was.

Q. It was not?

A. Well, I mean, I don't know whether actually the account was closed when this mess came up.

Q. I am not trying to trick you.

A. I understand that. Are you sure it was closed?

Q. I don't know either. I am asking you. Were [158] there deposits made to that account after May 15, 1958, to and including, say, July 1st, 1958?

A. Well, they are not in the ledger.

Q. No, the ledger ends there. I am asking you this question because the ledger has ended and I wondered.

A. I wired \$2,500 over here. At that time the P.C. account, the Petroleum Corporation of America was over-drawn \$50,000. And I wired the \$2,500 to my account and it was applied to the P.C.A.'s account, which was all right, one and the same.

Q. In May, May 15th?

A. Whenever it was.

Q. But with regard to your personal account, after May 15th there were no further transactions? All the money was taken out to try to pay this P.C.A. over-draft, is that correct?

A. As far as I know, yes.

(Testimony of B. A. Williams, II.)

Q. Showing you a photostat of a check dated May 28, 1958, I ask you, is that your signature on that photostat? (Showing a document to the witness.)

A. Yes, this is my signature.

Q. And that check is payable to the Bureau of Land Management. It is for \$480?

A. That's right.

(Mr. Conklin shows document to Mr. [159] O'Neill.)

Mr. Conklin: Your Honor, we offer this photostat in evidence.

The Court: There being no objection, it will be received as exhibit 33.

(The document referred to was received in evidence as Plaintiff's exhibit number 33.)

Q. (By Mr. Conklin): I show you a photostat of a check dated June 11, 1958, Mr. Williams, and I ask you, is that a reproduction of your signature on the photostat? A. Yes, it is.

Q. And that check is payable to the Circle Drive Shopping Center, is it not? A. Yes, sir.

Q. That is June 11th, 1958? A. Yes.

Q. And the check is for \$25,000, is that correct?

A. Yes, sir.

(Mr. Conklin shows document to Mr. O'Neill.)

Mr. Conklin: Your Honor, we offer this check dated June 11, 1958, in evidence.

The Court: It will be received as exhibit number 34.

(Testimony of B. A. Williams, II.)

(The document referred to was received in evidence as Plaintiff's Exhibit number 34.)

Q. (By Mr. Conklin): Mr. Williams, I hand you Plaintiff's exhibits 29-A, 31-A, 32-A, 33 and 34 and ask you to look those over. (Handing documents to the witness.) Is it not true, Mr. Williams, that all of those checks were drawn on your personal account at the Bank of Hawaii?

A. Yes, they are.

Q. Do you know what the total of those checks is?

A. It have no idea.

Q. You heard Mr. Klenske's testimony here in Court yesterday, didn't you?

A. Yes.

Q. You heard Mr. Klenske testify, that he said that you were kiting? He said you admitted you were kiting. You heard him say that?

A. Yes.

Q. Did you say that to him?

A. I told him that this whole thing developed into that. It was not intentional and never started out to be intentional and all I started to do was trying to get the mess cleaned up.

Q. You heard Mr. Klenske's testimony here yesterday?

A. Yes, I did.

Q. And you heard Mr. Klenske say that you told him that you were kiting and you said yes? You heard him say that yesterday? [161]

A. Yes, I said I heard him say that.

Q. Did you say that?

A. I am telling you what I told him. I told him that that is what it developed into. It was not in-

(Testimony of B. A. Williams, II.)

tentional and we would get it straightened out as quickly as possible. Whatever you want to call it. I don't even know what that word means.

Q. Now, showing you Plaintiff's exhibit number 14, being a deposit slip to your personal account in the Bank of Hawaii for \$44,000 total, that is the amount you told Mr. Ranieri to deposit after Mr. Doing told you were going to receive these interests? A. Yes.

Q. Why did you tell Mr. Ranieri to deposit two checks, one for \$28,000 and the other for \$16,000 rather than one check for \$44,000?

A. I don't recall.

Q. You don't recall?

The Court: Is this a convenient place to interrupt your cross examination?

Mr. Conklin: Yes, your Honor.

The Court: Ladies and gentlemen of the jury, you will be excused for a 10-minute recess.

(Jury leaves courtroom at 10:50 a.m.) [162]

The Court: What is the status of your instructions, Mr. Conklin?

Mr. Conklin: Very rough, your Honor. However, I believe in a situation whereby if I had an hour, I think, I would be ready with that.

The Court: You don't have to prepare general ones.

Mr. Conklin: I understand that.

The Court: What is the status of yours?

Mr. O'Neill: I have prepared instructions, your Honor. I have five that I intend to tender. And

(Testimony of B. A. Williams, II.)

general instructions, I understand that the Court has those.

The Court: Yes.

Mr. O'Neill: These are just special ones.

The Court: That's all I have. To save time, get yours under way. I would like to get this case to the jury today.

Mr. Conklin: Your Honor, counsel intends to.

The Court: So do I. The Court will stand at recess.

(A recess was taken.)

After Recess

The Court: The record will show that the jury is present, the Defendant and his counsel. Proceed.

Q. (By Mr. Conklin): Mr. Williams, you [163] stated on direct examination that the money that was owed by you because of the over-draft, owing to the Bank of Hawaii, was paid back in June?

A. Yes, sir.

Q. Who paid it back?

A. I borrowed it from investors and I walked into Mr. Klenske's office on the afternoon that I had the money with Doctor Chun, and Mr. Klenske was tied up in a meeting so we left the money there at that time. There was a number of checks.

Q. And when you say you borrowed the money from investors, whom were you referring to?

A. People that had been investing with me.

Q. People in the Territory of Hawaii?

A. Yes.

(Testimony of B. A. Williams, II.)

Q. And have you paid back the loan you made from those investors?

A. Arrangements have been made. The money has been paid and was committed to Mr. O'Neill's trust, to them, yes, sir.

Q. You stated on direct examination that you never drew against the Seattle account?

A. I don't understand what you mean by draw. against. Sure, there were checks written against the Seattle account. [164]

Q. Did you write checks against the Seattle account?

A. Yes. Not only myself. Ralph Purvis and Warren Doing were writing.

Q. I was just trying to clear up my notes. I guess I didn't have it right. On direct examination you stated that you had bank accounts as follows: You had an operating account in Denver; you had an investors' account in Honolulu; and you had an account in Seattle to process checks?

A. Yes, sir.

Q. Now, the investors' account in Honolulu was carried—what was the name of the account?

A. What I meant by investor's account was the money received from the investors to go in on these joint ventures, that it was deposited to the account at the Bank of Hawaii. There were two accounts, one under the name of Petroleum Corporation of America and one under my name personally. I was the only one authorized to sign on both of those accounts.

(Testimony of B. A. Williams, II.)

Q. And did you have any other accounts in Honolulu in April and May of 1958?

A. Yes, I did, but it didn't enter into this.

Q. What other accounts did you have?

A. I had an account at the Bishop National Bank.

Q. And any other banks? [165]

A. In Honolulu?

Q. Yes. A. No, sir, I did not.

Q. In the Territory of Hawaii? A. No.

Q. Now, you stated on direct examination that you came out here to Hawaii to get investors for capital to drill wells, is that the idea?

A. Yes, sir.

Q. And that constitutes a joint venture between the investors and Petroleum Corporation of America?

A. It is a joint venture, limited partnership sort of affair, yes.

Q. And the purpose of putting up such funds by investors is to drill wells upon which the Petroleum Corporation of America has leases, is that the idea? A. Yes, sir.

Q. Then why would you deposit, invest money in your personal account? Doesn't that money belong to the investors and the corporation for the joint venture rather than you personally?

A. I thought I explained it. Petroleum Corporation of America account and mine are actually in effect one and the same. It doesn't make any difference. Our books are co-mingled. The C.P.A. firm

(Testimony of B. A. Williams, II.)

that handles the books takes [166] the deposits. There's an awful lot of bills I paid out of my personal account for one reason or another. Maybe it was more convenient at that time. Or checks were drawn against the P.C.A. account. It made no difference.

Q. However, it is true that funds received from investors here in the Territory for use in a joint venture with Petroleum Corporation could at will go into your personal account?

A. Oh, yes, it is the same thing.

Q. Showing you Plaintiff's exhibit number 34, being a check drawn on your personal account at the Bank of Hawaii, June 11th, 1958, for \$25,000 payable to Circle Drive Shopping Center, you stated on direct examination that you made a second payment to a Drive-In, that you were purchasing at this time, is that not correct?

A. Not a Drive-In; a Shopping Center.

Q. Shopping Center. Excuse me. A. Yes.

Q. Is that the Circle Drive Shopping Center?

A. Yes, sir.

Q. So that the check was for an additional amount to do it?

A. Yes, this particular check you mean?

Q. Yes.

A. This particular check was a post-dated check [167] that was given to Mr. Green when the deal was first consummated back in, I believe, it was March of 1958. This was to be the third payment. At that time I didn't have the money.

(Testimony of B. A. Williams, II.)

Q. And in June, 1958, who owned Circle Drive Shopping Center?

A. In June of 1958, Mr. Green had a half interest in it, and then we had a half interest.

Q. Who is "we"? A. I.

Q. You had a half interest?

A. That's right.

Q. So in March, 1958, you gave this gentleman a post-dated check dated June 11, 1958 for \$25,000 drawn on your personal account at the Bank of Hawaii, is that correct?

A. I gave him two checks at that time. Actually I gave him three checks. There is one for \$10,000 which was paid. There was one for \$27,000 odd amount which was paid. And this was this one that you have in your hand now which was not paid.

Q. But in March you had given him this check post-dated to June 11th for \$25,000 as a payment on the Shopping Center and drawn against your personal account, is that correct? [168]

A. That's right.

Q. Is the Shopping Center engaged in the oil business? A. No, sir, it is not.

Mr. Conklin: No more questions.

The Court: Redirect, Mr. O'Neill?

Mr. O'Neill: Just a couple of points.

Redirect Examination

Q. (By Mr. O'Neill): Mr. Williams, you have referred to what is marked here or admitted in evidence as people's exhibit number 30, being the letter

(Testimony of B. A. Williams, II.)

from Ralph Purvis. That letter or this exhibit does not pertain in any manner to the qualifications of Petroleum Corporation of America before the U. S. Securities Commission, does it?

A. None whatsoever. Or the Washington State was the one that we were involved with. This is merely a procedure that all corporations must follow in each of the States that they do business. Our corporation was qualified to do business in the Territory as well as Colorado and some other States.

Q. This merely refers to the fact that a company is doing business, like a license or something like that? A. Yes.

Q. Within that State? [169]

A. I believe that is what it is.

Q. This has no reference whatsoever nor does it pertain in any manner to what we were discussing previously of the company having to qualify before the Securities Commission?

A. Not in the least, no.

Q. So it is two entirely different things there?

A. That's right.

Q. And this thing doesn't pertain to it?

A. I don't know what it says.

Q. Now, this last exhibit here that he has marked as people's exhibit number 34, purporting to be a check drawn on the Bank of Hawaii, was that check ever paid, \$25,000 to the Circle Shopping? A. No, this check was never paid, no.

Q. It was never paid? A. No.

(Testimony of B. A. Williams, II.)

Q. When did you give this check to Mr. Green?

A. When we first signed the agreement. There was to be several different payments on the Shopping Center. The whole deal was, I believe, some \$300,000. And I was to come up with my half of that.

Q. Now, going back to what has been marked in evidence here as people's exhibit number 29-A, which purports to be a series of checks, especially referring [170] to this one check to Jim Green for \$27,520,—

A. Yes.

Q. —now, this particular check had bounced once, didn't it?

A. Yes, it did.

Q. And when was that check given to Mr. Green?

A. That was given when this initial agreement—it was some time in March, I believe it was.

Q. It appears right on the back of the check as to when the thing was returned by the bank, doesn't it?

A. It was protested April 24th.

Q. And then it was put through after that?

A. Then it was redeposited, yes. He called me and I told him to put it back through.

Q. And that was based on the information you had received from Seattle that that money was there?

A. Yes.

Q. And that was the reason for doing it?

A. Yes.

Q. And all of these others, without having to

(Testimony of B. A. Williams, II.)

go through them all one by one, all of these others, weren't they all a bunch of post-dated checks?

A. Unfortunately, yes. When someone would come into the office or I would see someone, I would give him a post-dated check and then contact and tell him when to [171] put it in. These dates mean nothing to me. I don't even know when they were given.

Q. This was during the time when you were running the whole business and had everything on your shoulders?

A. That's right.

Q. And this exhibit 34, he evidently put that through the bank for some purpose of his own long after this thing was disclosed, is that right?

A. Yes.

Q. This check of June 11th?

A. Yes.

Q. This was during the time you were in Oklahoma after your father's death?

A. Yes.

Mr. O'Neill: That's all. Thank you.

The Court: Recross?

Recross Examination

Q. (By Mr. Conklin): With regard to Mr. Purvis' letter of April 1st, 1958, Mr. Williams, isn't it true that Petroleum Corporation of America never did qualify to do business in the State of Washington?

A. I don't really know, Mr. Conklin. It might have been at the time the papers were completed that we found out it was going to be too expensive to register there. And there was just not much

(Testimony of B. A. Williams, II.)

profit in these deals [172] and we just couldn't afford to do it.

Q. But you stated on cross examination that you were working with Mr. Doing and Mr. Purvis in Seattle, is that correct? A. That is true.

Q. So that whether the corporation qualified to do business or not, you do not know? But the corporation was doing business in Washington, isn't that correct?

A. That's right. I leave all this up to my attorneys. I know absolutely nothing about it. If they don't get it in in time and I found out later that they sit around and fail to do things when they are supposed to, I don't know.

Q. Now, with regard to these post-dated checks, in March of 1958, weren't you receiving money from Hawaii investors to go into this joint venture with Petroleum Corporation of America?

A. I believe we did.

Q. During that period?

A. Yes, I believe so.

Q. In the early part of 1958?

A. Yes, during the early part, definitely, yes.

Q. And it was during that period that payments by such local investors could go into the Bank of Hawaii corporation account or into your personal account? A. That is true.

Q. And that is when you were post-dating these checks that you have spoken about on redirect?

A. That is true.

Mr. Conklin: No further questions.

(Testimony of B. A. Williams, II.)

Mr. O'Neill: That's all.

The Court: Just a moment. You testified that you were here for two weeks in November of 1956, approximately?

The Witness: Yes, sir, I was.

The Court: And then how many times did you come back to Honolulu after that?

The Witness: Roughly 30 times.

The Court: 30 times?

The Witness: Yes.

The Court: For extended stays or short stays?

The Witness: Well, it would vary. I think one time I spent maybe 40 days here or 30 or 40 days. But usually it would be for about a week. And I would go back to the mainland. One time I came in at 8:00 o'clock in the morning and left again that afternoon at 5:00. So it just varied.

The Court: But you made about 30 trips? [174]

The Witness: Yes, sir.

The Court: That's all. You may step down.

(Witness excused.) [175]

* * * * *

Honolulu, T. H., February 3, 1959

(Court and counsel met in Chambers at 1:00 p.m. for the purpose of settling instructions as follows:)

The Court: Mr. O'Neill, it is my practice for the purpose of making the record less lengthy to go through the requested instructions informally and come to a decision on them, and then for the

purpose of the record those that I give over your objection or those which I refuse to give, go through numerically and state your grounds, and the government, too.

Mr. O'Neill: That is fine. Your Honor, I would like to do this for the purpose of the record, make some motions, and I would like to have them with the same effect now as though they were made at the conclusion of the government's case.

The Court: I will let you make them for the record.

Mr. O'Neill: On behalf of the Defendant, the Defendant requests the Court to enter a judgment of dismissal as against the information in all six counts based upon, one, that the government has failed to prove each and every material allegation of all six counts of the information. Two. That the government has failed to [189] prove a fraudulent scheme or intent at the time and prior to the time that the alleged acts recited in the information were committed. Three. That the government has failed to prove by even the slightest evidence any fraudulent intent whatsoever in the entire transactions complained of.

The Court: I will treat your motion as one made after all of the evidence is in and will reserve ruling on the motion and submit the case to the jury.

(The settling of instructions, discussion thereon, was had off the record.) * * * * *

The Court: Section 1341 of Title 18 of the U. S. Code provides in part that whoever, having devised

or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses or representations, for the purpose of executing such scheme or artifice or attempting to do so, knowingly causes to be delivered by mail according to the direction thereon any matter or thing whatever, shall be guilty of an offense.

It is not necessary under this Section that such unlawful scheme actually succeed. The Court charges you that under the law which has just been read to you, it is immaterial whether the Defendant obtained any money [196] or not, and that it was not necessary for him to actually obtain any money by his acts to be guilty of the offense defined by the statute. When one does an unlawful act with knowledge that the use of the mails will follow in the ordinary course of business, or where he could have reasonably foreseen the use of the mails in the ordinary course of business, even though he did not actually intend that the mails be used, he causes the mails to be used, and it is an offense under Section 1341, Title 18.

The crime with which this Defendant is charged consists of two elements: First, devising or intending to devise any scheme or artifice to defraud; and, second, using or causing to be used U. S. Mails in the execution or attempted execution thereof. It is not necessary to prove that the accused personally did the acts constituting the offense charged. Whatever a person is legally capable of doing himself can be done through another as agent. Hence, if the acts

purpose of the record those that I give over your objection or those which I refuse to give, go through numerically and state your grounds, and the government, too.

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The crime with which this Defendant is charged consists of two elements: First, devising or intending to devise any scheme or artifice to defraud; and, second, using or causing to be used U. S. Mails in the execution or attempted execution thereof. It is not necessary to prove that the accused personally did the acts constituting the offense charged. Whatever a person is legally capable of doing himself can be done through another as agent. Hence, if the acts

of an employee or other agent are wilfully ordered or directed or wilfully authorized or consented to by the accused, the law holds the accused responsible for such acts as though personally committed by him.

Fraud is rarely susceptible of direct proof but must ordinarily be established by circumstantial evidence and legitimate inferences arising therefrom. Fraud may be established by facts and circumstances [197] from which reasonable men would infer that the transaction was fraudulent.

A check kite is defined as a scheme whereby a false credit is obtained by the exchange and passing of worthless checks between two or more banks.

You are further instructed that the obtaining of checking account credit from a bank, even temporarily, is a thing of value. [198]

* * * * *

[Endorsed]: Filed July 7, 1959.

[Endorsed]: No. 16530. United States Court of Appeals for the Ninth Circuit. B. A. Williams, II, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed and Docketed: July 8, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 16530

B. A. WILLIAMS II, also known as BYRON A.
WILLIAMS II, Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff-Appellee.

SPECIFICATION OF POINTS

Comes now the defendant above named, by and through his attorney, and hereby specifies the points relied upon by the defendant in the appeal of this case.

1. That the trial court erred as a matter of law in refusing to grant judgment of dismissal in favor of the defendant at the conclusion of the Government's case, and that the trial court prejudiced the rights of the defendant in refusing to allow the motion for judgment of dismissal to be argued outside of the presence of the jury.

2. That the trial court erred as a matter of law in refusing to dismiss the information on the motion of defendant inasmuch as the information did not constitute offense within the meaning of the statute.

3. That the defendant failed as a matter of law to prove each and every material allegation of the information in that the Government did not show

that the offense was willful, or that the defendant had benefited in any manner, or that the banks, as charged in the information, were injured in any manner as a result of the actions of the defendant.

4. That the trial court erred as a matter of law in refusing to grant to the defendant a new trial or judgment of dismissal on motion of the defendant.

/s/ FRANCIS P. O'NEILL,
Attorney for Defendant-
Appellant.

[Endorsed]: Filed July 29, 1959. Paul P. O'Brien, Clerk.

No. 16530

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

B. A. WILLIAMS II,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

FILED

1957

PAUL F. O'BRIEN, CLERK

ARTHUR A. BROOKS, JR.,

6331 Hollywood Boulevard,
Hollywood 28, California,

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I.

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No. 16530
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

B. A. WILLIAMS II,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court
for the District of Hawaii.

APPELLANT'S OPENING BRIEF.

Jurisdictional Facts.

This case involves an appeal from United States District Court for the District of Hawaii wherein defendant appellant B. A. Williams, II, was convicted upon six counts of mail fraud violation of 18 U. S. C. Section 1341 upon information filed by the United States Attorney for the District of Hawaii [Record, pp. 4-8 incl.]. Indictment for violating the same statute was waived by appellant who consented that the proceeding might be had by information instead of by indictment [Record, p. 3].

This Court has jurisdiction to hear this appeal from the District Court for the District of Hawaii pursuant to the provisions of 28 U. S. C. A. Section 1291. The cited statutory section provides that the Court of Appeals shall have jurisdiction of appeals from all final dispositions of the District Courts of the United States. United States

District Court for the District of Hawaii is a District Court of the United States within the purview of the statutory section just cited.

Statement of the Case.

The appellant in the instant case, B. A. Williams, II, is a citizen of the United States of age 30 years without prior criminal convictions. Since his discharge from the Intelligence Branch of the Air Force in 1953 and at all times pertinent to this appeal he has been engaged primarily in the independent oil producing business in the Western continental United States and Hawaii. Prior to his military service he had been employed to buy gas and oil leases by several major oil companies.

During the years 1957 and 1958 appellant was engaged in such business, both individually and through a Colorado corporation, organized and owned by him and known as Petroleum Corporation of America, hereinafter referred to as the Corporation. During this period appellant maintained his main offices in Denver, Colorado, with branch offices in Seattle, Washington, and Honolulu, Hawaii.

More specifically, and with particular reference to his business activities in Seattle and Honolulu, appellant sold working interests in the drilling of oil wells under leases owned by appellant and/or the Corporation to investors in the named areas [Record, pp. 20-21, 100-102]. In connection with these activities appellant maintained personal and Corporation checking accounts in the Bank of Hawaii main branch in Honolulu [Record, p. 22], a Corporation account in the Seattle First National Bank, Seattle [Record, p. 75], and personal and Corporation accounts in the United States National Bank of Denver [Record, pp 92-93].

During the period in late April and early May of 1958, pertinent to this appeal, one Dominick S. Ranieri was

resident manager of appellant's Honolulu office [Record, p. 20], and one Ralph Purvis was resident manager of appellant's Seattle office [Record, p. 110]. A Mr. Warren P. Doing was co-manager of the Seattle office [Record, p. 130].

In 1957 and prior to April 1958 appellant and Corporation had been engaged in extensive oil drilling operations primarily in the State of North Dakota [Record, pp. 106, 119]. Appellant had contracted with one Gates to furnish the supplies and equipment necessary for such drilling operations [Record, p. 107]. Appellant himself was spending considerable time in Hawaii selling working interest to investors there during this period [Record, p. 106].

Appellant paid Gates his contract price to furnish the well equipment (approximately \$30,000.00), but Gates failed to pay his suppliers who thereupon filed liens against appellant's lease-hold interests in North Dakota [Record, pp. 107-109]. In order to raise funds to release such liens by selling some of appellant's interests in already producing wells, appellant opened an office in Seattle through Doing and Purvis [Record, pp. 109-110].

On or about April 24, 1958, Doing advised appellant that some \$46,000.00 worth of interests had been sold in the Seattle area and that he, (Doing), was about to collect these funds. Doing inquired as to what he should do with such funds. Appellant advised Doing to deposit the funds in the Corporation account in the Seattle First National Bank and that appellant would then transfer such funds to Honolulu [Record, p. 111]. This appellant did by drawing Corporation checks on the Seattle Bank totalling \$44,000 and depositing such checks to appellant's account through appellant's manager Ranieri in the Bank of Hawaii in Honolulu [Record, pp. 112 and 47]. Appellant then, under extreme pressure from creditors, and

relying on the fact of Doing's deposit in Seattle, wrote a number of checks on the Hawaii Bank [Record, pp. 112-113, 122-126].

However, Doing did not make the deposit on April 24, 1958, as appellant had believed, because of certain legal requirements encountered by Petroleum Corporation of America, a Colorado corporation, in entering to do business in the State of Washington [Record, p. 114]. Anticipating return of the Seattle checks deposited in the Bank of Hawaii and of the various checks to creditors because of the failure of the Seattle deposit appellant made every effort to sell all his available leases [Record, p. 115] and to borrow funds to meet said checks [Record, pp. 114-115]. Appellant also wrote checks on and made various deposits in the several accounts hereinabove described in an effort to keep returned items at a minimum until funds were available to cover all checks deposited and written in favor of creditors [Record, pp. 114, 117]. Nevertheless, the net result was an overdraft at Bank of Hawaii of approximately \$50,000.00 by on or about May 15, 1958 [Record, p. 49].

At no time was appellant ever instructed by any of the banks involved not to write checks against checks deposited therein until the latter had cleared. Nor is there any dispute as to the fact that appellant's personal account and Corporation's account were used interchangeably in appellant's business and with full knowledge and approval of appellant's investors [Record, p. 123].

Neither the Seattle Bank nor the Denver Bank suffered any financial loss whatever by reason of the foregoing transactions [Record, pp. 89, 96]. Nor did appellant realize any personal gain, benefit or profit whatever therefrom.

Bank of Hawaii was kept fully informed by appellant and his manager, Mr. Ranieri, at all times as to appellant's vigorous efforts to cover the overdraft there [Record,

pp. 65-66]. Through appellant's efforts and on June 26, 1958, Bank of Hawaii was reimbursed in full [Record, p. 68].

In October 1958 appellant was indicted by a Federal Grand Jury in Honolulu for violation of 18 U. S. C. A. 1341—Mail Fraud. Appellant later waived indictment [Record, p. 3] and proceeded to trial by information [Record, pp. 4-8].

The information upon which appellant was tried consisted of six separate counts charging appellant with devising a check kiting scheme to defraud involving Denver, Seattle and Hawaii banks and causing checks to be placed in the mail for the purpose of executing such scheme. The information did not follow the specifications of the statute in a number of particulars to be detailed and discussed in the Argument, pages 8-12, *infra*, this Brief.

After trial to a jury on February 2 and 3, 1959, in the District Court of the United States for the District of Hawaii, Honorable Jon Wiig presiding, defendant was found guilty on all six counts [Record, p. 9]. Motions to set aside the verdict of the jury or in the alternative for a new trial and a motion to dismiss the information were denied [Record, pp. 9-11]. Thereafter, and on April 3, 1959, [Record, pp. 11-13] defendant was adjudged guilty and was sentenced to six months imprisonment and fined \$1,000 as to each of counts I, II, III, IV and V, the sentences to run concurrently, the execution thereof suspended and appellant placed on probation for five years. As to count VI, imposition of sentence was suspended and appellant placed on probation for five years. The periods of probation as to each count were to run concurrently. The above fines were to be paid within 90 days, otherwise the appellant to stand committed until payment. Jurisdiction of the case and supervision of probation was trans-

ferred to the United States District Court for the District of Colorado, the District of appellant's then residence.

Notice of appeal was timely filed together with transcript of record in the District Court for the District of Hawaii and specification of points relied upon by appellant in the taking of this appeal [Record, pp. 153-154].

Arthur A. Brooks, Jr. of Los Angeles, California, entered his appearance in this Court as counsel for appellant on November 25, 1959. Mr. Brooks was not associated with trial counsel Mr. O'Neill and Mr. Andrews of Denver, Colorado, in the proceedings had below.

Questions Involved.

1. Does the information sufficiently charge an offense under 18 U. S. C., Sec. 1341, or is it fatally defective because it omits the element of knowledge on the part of appellant that he caused delivery of checks through the mails by omission in the information of the statutory term "knowingly"?

2. Does the information sufficiently charge an offense under 18 U. S. C., Sec. 1341, or is it too vague and uncertain in that it cannot be determined therefrom whether appellant is charged with placing and/or receiving fraudulent matter in or from the mails or knowingly causing delivery thereof through the mails?

3. Is the evidence sufficient to show that appellant devised a fraudulent scheme?

4. Is the evidence sufficient to show that appellant knowingly used the mails or caused their use in the execution of a fraudulent scheme?

5. If appellant devised a fraudulent scheme to obtain fictitious bank credit was such scheme completed before the mails were used?

6. Did the trial court err as a matter of law in refusing to grant appellant's judgment of dismissal or in the alternative for a new trial on the grounds above specified?

7. Did the trial court err as a matter of law in failing to grant appellant's motion to dismiss the information?

Specification of Errors.

1. The trial court erred as a matter of law in refusing to dismiss the information on appellant's motion because the information is fatally defective in that it failed to charge appellant with *knowingly* causing the delivery of checks through the mails.

2. The trial court erred as a matter of law in refusing to dismiss the information because the information is too vague and uncertain to apprise appellant of the crime with which he was charged in that it cannot be determined therefrom whether appellant is charged with placing and/or receiving fraudulent matter in or from the mails or knowingly causing delivery thereof through the mails.

3. The trial court erred as a matter of law in failing to grant judgment of dismissal at the conclusion of the government's case because the evidence was insufficient to show that appellant devised a fraudulent scheme.

4. The trial court erred as a matter of law in failing to grant judgment of dismissal at the conclusion of the government's case because the evidence was insufficient to show that appellant knowingly used the mails or caused their use in the execution of a fraudulent scheme.

5. The trial court erred as a matter of law in failing to grant judgment of dismissal or motion for a new trial at the conclusion of the case because the evidence showed that appellant's fraudulent scheme, if any, was completed before the checks involved were sent through the mails.

ARGUMENT.

I.

THE INFORMATION HERE IS FATALLY DEFECTIVE
BECAUSE:

A. It Failed to Charge Appellant in the Statutory Language With Knowingly Causing Delivery of Checks Through the Mails and:

B. It Is Too Vague and Uncertain to Apprise Appellant of the Exact Nature of the Crime With Which He Is Charged in That It Cannot Be Determined Therefrom Whether Appellant Is Charged With Placing and/or Receiving Fraudulent Matter in or From the Mails or Knowingly Causing Delivery Thereof Through the Mails.

A. The information may be attacked at any time. Rule 12 (b) (2), *Federal Rules of Criminal Procedure*. The question of the sufficiency of an indictment (or information) may be raised after plea, sentence or judgment. *United States v. Calhoun*, 257 F. 2d 673 (1958).

Appellant, as heretofore pointed out, was charged with six counts of violation of 18 U. S. C. 1341, formerly 18 U. S. C. 338. The statute provides as follows:

“Section No. 1341. Frauds and swindles.

“Whoever, having devised or intending to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious

article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or *knowingly* (emphasis ours) causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than 5 years, or both."

From an examination of the information [Record, pp. 4-8] it is evident that the alleged violation set forth in each count involved the same mechanics. The counts differ from one another only in dates and amount of checks, checking accounts utilized, and drawee and depository banks. All counts employ the language ". . . for the purpose of executing such scheme and artifice (appellant) caused to be placed in a post office." In none of the counts is the statutory term *knowingly* employed between the words "artifice" and "cause". It is submitted that failure to use such statutory term renders the information fatally defective in the instant case.

United States v. Ball, 294 Fed. 750, involved an indictment for violation of former section 338 of 18 U. S. C. where it was alleged defendants sent a false statement of their financial condition through the mails. It was held that a failure to allege the knowledge of defendants as to the truth or falsity of the statement made was fatal, such omission being of matter of substance, and not a defect or imperfection in matter of form only.

By necessary implication the case of *Wilkes v. U. S.*, 80 F. 2d 285 (1935), emphasizes the necessity of the allegation of *knowingly* causing the use of the mails. At page 288 this Court stated:

“It is further argued by these appellants that if count 12 be regarded as attempting to charge the offense of causing delivery of the letter in question, it is defective in not alleging that the defendants ‘knowingly’ caused such delivery. The point is not well taken. Count 12 alleges that the defendants ‘did * * * knowingly * * * cause to be placed in the U. S. Post Office * * * and cause to be delivered by the Post Office establishment of the U. S.,’ the letter therein referred. This means that both acts (causing the letter to be mailed and causing it to be delivered) were done knowingly. In so alleging, it was not necessary to use the word ‘knowingly’ twice. *Once was enough.*” (Italics ours.)

It is clear from the Record [pp. 4-8] that the government failed to use the vital word *knowingly* even once in the case at bar.

Although not involving the mail fraud statute two recent cases decided in the Tenth Circuit support appellant’s contention here. *Robinson v. U. S.*, and *Burley v. U. S.*, 263 F. 2d 911 (1959) involved unlawful trafficking in Narcotics under 21 U. S. C. A. 174. Trial court convictions were reversed and it was held that an indictment charging an offense under the Narcotics, Drug, Import and Export Act must allege that the accused knew that contraband was imported or brought in to the United States contrary to law and an indictment which failed to make such essential allegation failed to state a public

offense, and such defect could not be regarded as harmless error. (Citing *Calhoun*, page 8, *supra*).

Appellant concedes that there are authorities holding the use of the word *knowingly* unnecessary in charging a defendant with depositing letters in the mails "where that is necessarily implied from the other averments." *Samuels v. U. S.*, 232 Fed. 536. However, such cases, it is submitted, are distinguishable from the case at Bar on the ground that here there can be no implication of knowledge on the part of appellant that the mails would be used from the other averments in the information. It is further submitted that charging a statutory crime by implication is not entirely in accord with established procedures of Anglo-American jurisprudence.

B. But the information here [Record, pp. 4-8] is subject to attack on the further ground of vagueness and uncertainty. From a reading of the Six Counts therein contained appellant could not apprise himself of the exact nature of the charges against him.

An analysis of the language of the statute as set forth above (pages 8-9, *supra*) shows that the statute covers two situations where a defendant devises a scheme to defraud. These two situations are as follows:

- (1) Where a defendant places or receives matter connected with a scheme in or from a mail depository or,
- (2) "knowingly" causes delivery of such matter by mail.

The information here does not employ the precise language of either of the above two statutory situations but confuses the two by charging that defendant "caused to be placed in a depository for mail matter, 2 checks, etc". The statute clearly requires that a defendant be charged

with either placing or receiving fraudulent matter in or from a mail depository *or knowingly* causing delivery of such by mail. The information here charges neither in clear and understandable terms. The appellant is entitled to know precisely with what statutory violation he is charged. It is, therefore, urged that the information here must fail on the grounds of vagueness and uncertainty in addition to the Government's failure to allege that appellant knowingly caused delivery through the mails as discussed hereinabove.

Under the evidence as will be developed below, it is clear that at most there was only a technical violation of section 1341 rather than an intentional one. There is not a scintilla of evidence that defendant realized any personal gain in any of the transactions described in the information. Thus, *a fortiori*, the information should be sufficient in all particulars and comply exactly with the offense contemplated by the statute.

II.

The Evidence Presented by the Government Was Insufficient to Support the Verdict in That It Failed to Show Beyond a Reasonable Doubt That Appellant Had Devised a Fraudulent Scheme.

It is true as set forth in the instructions of the Court to the jury [Record, pp. 151-152] that it is not necessary to prove a violation of the mail fraud statute that a fraudulent scheme, once devised, succeed, or that the defendant obtain any money as a result of such scheme. However, evidence showing that defendant obtain no monetary benefit from the transactions involved and that no banking institution or anyone else suffered any financial loss whatever raises a strong inference that there was no

fraudulent scheme devised by appellant nor did he at any time harbor any intent to defraud anyone. The following testimony from the record below clearly supports this position:

Testimony of Government witness Dominick S. Ranieri [Record, p. 34]:

“Q. Mr. Williams did tell you at the time that you made these Bank of Hawaii deposits that interests had been sold and there was money in the Seattle Bank, is that right? A. Yes, sir.

Q. And that he had been told by his manager up there that these interests had been sold? A. Yes, sir.”

Testimony of Government witness Carl R. Klenske [Record, pp. 65-66]:

“Q. Now Mr. Klenske, in connection with this, weren't you kept notified at all times that Mr. Williams was attempting to put the money in the bank in Denver through Mr. Ranieri and others? A. Yes, I say that I have been repeatedly told.

Q. They kept you fully advised of it? A. By Mr. Ranieri, well, solely by Mr. Ranieri but he would quote Mr. Williams since I had not met him, that he was trying to raise the money and it was coming from Seattle or from Denver. That is true.

Q. In other words, they never attempted to keep anything from you? They simply said they didn't have the money at the time but they were desperately trying to get it to cover that check? A. They told me that they were making every effort to cover that check, that is true.”

[Record, pp. 67-68, 70]:

“Q. Also, didn’t he send funds or authorize funds from his personal account to be applied against this overdraft? We will put it this way: Weren’t funds from his personal account applied against this overdraft? A. Yes. The balance that existed in the personal account was applied to this overdraft.

Q. In other words, the bank has been reimbursed in full? A. In full, that is correct.

Q. In other words, he was going to take care of all the money, that the oil returns were to be paid to the investors here and these lease sales were to be assigned to the bank as security for this money? A. That’s right.”

Testimony of Government witness Philip V. Taggart [Record, p. 89]:

“Q. Now, the Bank of Seattle is not out one cent as a result of this transaction, are they? A. No.

Q. They have never lost one penny, have they? A. No.”

Testimony of appellant, B. A. Williams II [Record, pp. 118, 121]:

“Q. Did you ever obtain anything at all from the proceeds of these checks yourself? A. Actually no, because there was other money put in all of these accounts during this time. We opened the account in Seattle with \$5,000 of our own money. And I bought about \$4,000 worth of furniture and office equipment to open the Seattle office with. Of course, all the travelling expenses. So actually I didn’t derive anything out of this \$50,000, no.

Q. Out of the entire thing? A. No.

Q. And did you ever at any time during this whole transaction ever intend to cheat or defraud anybody in connection with this? A. I certainly did not.

Q. You did everything you possibly could to keep them advised and let them know what was going on in the situation? A. I did. I called Ranieri up every day during the course of the situation and told him to do different things, to call Mr. Klenske and advise him that we certainly weren't running out on anybody. It was an unfortunate situation that happened and we were going to get it straightened out as quickly as possible, as quickly as we could.

Q. And eventually it was done? A. That is true."

III.

The Evidence Presented by the Government Was Insufficient to Support the Verdict in That It Failed to Show Beyond a Reasonable Doubt That Even if Appellant Had Devised a Fraudulent Scheme He Knowingly Used the Mails or Caused Their Use in the Execution Thereof.

As stated in *United States v. Browne*, 225 F. 2d 751 (1955) page 757: "In any event, it is not the scheme to defraud which the Federal statute condemns but only the use of the mails in its execution. It is that use which constitutes the corpus delicti of the offense."

Under the assumption, not granted by appellant here, that any of the checks introduced into evidence were used in connection with a fraudulent scheme there is no positive evidence whatever that appellant knew or intended that such checks be sent through the United States mails. Such use was purely mechanical on the part of the sev-

eral banks involved. Certainly other modern means of transmittal, such as air express, might well have been contemplated by one in Appellant's shoes, assuming one in his shoes would contemplate any particular means of transmittal at all, a doubtful assumption at best.

This case, indeed, bears no similarity on its facts to the usual "check-kiting" cases involving, *inter alia*, the use of fictitious names and the swindling of innocent parties. *e.g.*, *United States v. Fromen*, 265 F. 2d 704.

That a verdict may be set aside for insufficiency of the evidence to establish the elements of the offense can not be doubted. *Graves v. U. S.*, 252 F. 2d 878 (1958).

IV.

Under the Evidence Here It Can Be Argued That the Fraudulent Scheme, if Any, Was Completed Before the Mails Were Used and in Such Case There Is No Federal Offense.

Assuming, but not admitting, that appellant did devise a fraudulent scheme to obtain fictitious bank credit it is contended that under all of the evidence such scheme was completely executed upon the deposit of the first two checks totalling \$44,000 in the Bank of Hawaii on April 25, 1958 [Record, p. 47]. This was the deposit which led to all subsequent transactions [Record, p. 63] and which was ultimately and within a very short time covered and paid in full by appellant [Record, p. 68].

In *Kann v. U. S.*, 323 U. S. 88 (1944), it is stated:

"The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States v. Kenofsky*, 243 U. S. 440. Also, to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which

are part of the scheme may be perpetrated. In these the mailing has ordinarily had a much closer relation to further fraudulent conduct than has the mere clearing of a check, although it is conceivable that this alone, in some settings, would be enough. The Federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate State law.” See also *Dyhre v. Hudspeth*, 106 F. 2d 286 (1939), and *United States v. McKay*, 45 Fed. Supp. 1001 (1942).

It is submitted that under the foregoing authorities the scheme, if any, here was fully completed before the United States mails became involved and consequently no Federal offense was committed.

Conclusion.

Summing up, reversal of the conviction here is urged primarily on the grounds of failure of the information to employ the necessary statutory language in charging the offense of mail fraud and on the insufficiency of the evidence to support the elements of the crime of mail fraud, to wit: A scheme to defraud devised by appellant and the knowing execution of that scheme by use of the mails.

Viewing the record as a whole, it is clear that foolish and careless though st appellant Williams may have been, fraudulent he was not.

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

ARTHUR A. BROOKS, JR.,
Attorney for Appellant B. A. Williams II.

No. 16,530

IN THE

**United States Court of Appeals
For the Ninth Circuit**

B. A. WILLIAMS, II,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
District of Hawaii in Criminal No. 11,312.

APPELLEE'S BRIEF.

LOUIS B. BLISSARD,

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FILED

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B. A. WILLIAMS, II,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
District of Hawaii in Criminal No. 11,312.

APPELLEE'S BRIEF.

JURISDICTIONAL STATEMENT.

Appellee agrees with Appellant's statement as to this Court's jurisdiction to hear this appeal, and as to the jurisdiction of the Court below.

STATEMENT OF THE CASE.

Appellant was in the oil business, operating out of Denver (R. 101 to 107). Part of his business involved the selling of oil drilling interests (R. 101 and 102),

which he was selling in Honolulu and Seattle during 1958 (R. 108 to 110).

From April 25, to May 14, 1958, a period of twenty days, Appellant passed the checks described in the Information.

The six-count Information filed against the Appellant upon his waiver of indictment (R. 3 to 8), alleged a mail fraud involving a check kiting scheme. It charged:

(1) On April 24, he deposited in Bank of Hawaii \$44,000 worth of checks drawn on the Seattle-First National Bank (where his then balance was but \$2,196.85);

(2) On April 30, he deposited in Seattle-First National \$45,000 worth of checks drawn on Bank of Hawaii (where his then balance was but \$10.65);

(3) On May 2, he deposited in the Hawaii Bank \$45,500 of Seattle checks (where his then balance was \$7,067.19);

(4) On May 6, he deposited in the Seattle Bank \$46,200 of Hawaii checks (where his then balance was \$510.65);

(5) On May 8, he deposited in the Hawaii Bank \$50,000 worth of Seattle checks (where his then balance was \$4,997.78);

(6) On May 14, he deposited in the Hawaii Bank \$51,000 worth of checks drawn on the United States National Bank, Denver (where his then balance was \$7.82).

The Information followed Form 3 of the sample forms attached to the Federal Rules of Criminal Procedure, and therefore did not allege that Appellant “knowingly” caused the mails to be used.

At trial, the Government produced uncontroverted testimony of a former agent for Appellant, and of the various banks’ officials. Such testimony related to use of the mails, and through it various documents were received in evidence showing the amounts of the checks alleged and the balances in the respective accounts on the dates alleged. (Since Appellant did not at trial dispute any of those matters, and does not here allege any error therein, Appellee omits specific record page references thereto.)

A Bank of Hawaii official testified that the Appellant stated to him that Appellant had been conducting a “check kite” during the period alleged (R. 61 and 62).

This constituted the Government’s case.

The Appellant testified in his own behalf (R. 100 to 121). Appellant testified that on or about April 24, his agent in Seattle, Mr. Doing, had informed him that \$46,000 worth of oil interests “had been sold and he was going to collect the money” (R. 111), which Appellant instructed him to deposit in the Seattle account.

Appellant then testified that many people were “hounding me for their money” (R. 111), so that when Doing informed him of the sale of the interests, “then I started writing checks to these people...” (R. 112).

Appellant went on to explain that the checks he then had drawn were: about \$27,000 to a Jim Green (R. 112), \$5,000 to T. N. Jordan, \$5,000 to Fred Wallace, \$1,100 to K. B. Well Service, and \$650 to Appellant's father (R. 113).

Appellant then reiterated, "Well, when Mr. Doing advised me that this \$46,000 was going to be deposited, I, of course, drew these particular checks that I just told you about." (R. 114). Later in his testimony, Appellant confirmed that these checks were written shortly after April 24 (R. 124).

However, as brought out on cross-examination, the Jim Green check was dated April 14. The T. N. Jordan check was for \$500 and dated April 11, and the K. B. Well Service check of \$1,100 was dated April 17 (R. 124). All of these dates of issue were prior to Doing's call on April 24, although on redirect examination, Appellant stated that the Jim Green check had actually been issued in March, 1958, but had been put back through after the Doing telephone call (R. 146). The dates of issue of the other checks were not denied. The check to his father was dated April 25 (R. 126).

Aside from the above-named checks, and the checks named in the Information, Appellant passed other checks during this period. These were: Montclair Insurance Company, April 25, \$50; J. H. Ware, April 29, \$500 (R. 126); John and Mary Burton, April 28, \$358.50; Bank of Hawaii, May 2, \$7,500; L. W. Kennedy, May 2, \$500; Janoil, May 5, \$500 (R.

134 and 135). In addition, two checks dated May 28 and June 11, 1958—both being therefore after the period of the check kite—were received in evidence. Both checks again were drawn on Appellant's personal account at Bank of Hawaii. The May 28 check was for \$480, and the June 11 check, payable to Circle Drive Shopping Center, was for \$25,000 (R. 137). Appellant stated that the latter check also had been issued in March (R. 144).

This constituted Appellant's other check-writing activities before, during and after the period covered by the kiting checks.

As previously stated herein, Appellant testified that the particular checks he referred to (R. 114) had been written on the basis of Doing's report that \$46,000 worth of interests had been sold. On cross-examination, Appellant admitted that he knew that on April 24 there were no written agreements covering such sales (R. 128), and that he knew that the interests had been "sold" only on oral representation (R. 129).

At any rate, Appellant stated that when he learned that the \$46,000 would not be forthcoming, ". . . Well, naturally, I was concerned because I had these checks out to these people and drawn against this account . . . And, of course, I knew that time was running and I was afraid that these checks would go back, insufficient funds. So I had Mr. Doing deposit some checks drawn against the Bank of Hawaii. And what I was trying to do is keep these checks from going back until I could get in money raised, until I could get this money raised." (R. 114).

Thus, Appellant himself testified that he had checks drawn against Bank of Hawaii and deposited in Seattle, so as to provide temporary credit. Appellant also testified that he told his Honolulu representative to draw and deposit additional checks in Honolulu (presumably against the Seattle or Denver accounts) “. . . so that they would have something on their ledger sheets rather than overdrawn account . . .” (R. 115 and 116).

In addition to these statements, Appellant admitted that he did later tell the Bank of Hawaii official that he had been conducting a check kite (R. 138), although Appellant stated “I don’t even know what that word means.” (R. 139).

The jury found Appellant guilty on each of the six counts (R. 9), and he thereafter perfected this appeal.

ARGUMENT.

POINT I. “KNOWINGLY” CAUSING THE MAILS TO BE USED IS NOT AN ELEMENT OF THE OFFENSE UNDER SECTION 1341.

Appellant here argues that the Information must fall because it does not charge him with *knowingly* causing the mails to be used.

It is of course true that if the charge omits an element of the offense, then the charge must fall. Therefore, the question here is, is knowledge an element of Section 1341? Appellant assumes that it is, but the Supreme Court says it is not.

“The elements of the offense of mail fraud under 18 U.S.C. (Supp. V) § 1341 are (1) a

scheme to defraud, and (2) the mailing of a letter, etc., for the purpose of executing the scheme. It is not necessary that the scheme contemplate the use of the mails as an essential element . . . Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used."

Pereira v. U. S., 347 U. S. 1, 8 (1954).

Appellee refers the Court to *U. S. v. Weisman*, 83 F. 2d 470 (CCA 2 1936), wherein was considered the old version of § 1341 [being 18 U.S.C. § 338 (1940 ed.)] which contained the same language as herein applicable. In that case, the indictment had charged that the defendant did "knowingly place and cause to be placed . . .", but the lower court's charge to the jury had omitted the word "knowingly". In commenting thereon, Augustus N. Hand stated, at p. 474:

"But '*knowingly*' has not been construed as involving absolute knowledge or intent. It is sufficient if the use of the mails may fairly be foreseen by a defendant as a step in the execution of a scheme to defraud . . . [citing cases] . . . The clause containing that word was not introduced into the statute until 1909 . . . and, in our opinion, did no more than to require that the steps in the causal chain which resulted in delivery through the mails should have been knowingly set on foot. For example, . . . if a letter had been mailed without authority which the defendant or his agent had placed in a desk with no intent to have it posted, the act of knowingly causing it to

be delivered by mail would not have been performed. . . . [But] . . . we can see no difference between causing a letter to be placed in an authorized depository for mail matters or in '*knowingly*' causing it 'to be delivered by mail' . . . The knowledge required is at most that the steps taken to execute the fraudulent scheme may under the circumstances known to the defendant naturally and probably result in the use of the mails" (Emphasis by the Court.)

It is to be noted that in the case at bar, the Court did use the word knowingly in its charge to the jury, and did render an appropriate instruction with regard to the natural and probable use of mails flowing from the defendant's check-kiting (R. 151).

In *Webb v. United States*, 191 F. 2d 512 (10th Cir. 1951), in commenting upon Appellant's claim that his indictment did not charge an offense under § 1341, the court stated, at p. 515,

"It is alleged that the defendants devised a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses and that the United States mails were used for this purpose. The scheme and artifice is set out with such clarity that there could be no doubt or uncertainty as to the nature of the offense charged. No further allegation of intent or knowledge is necessary or required by the statute."

See *Kreuter v. United States*, 218 F. 2d 532 (5th Cir. 1955), which upheld the wording used in the indictment therein, since the elements of the offense under § 1341 were clearly charged. The indictment in

the *Kreuter* case did not use the word “knowingly.” The indictment is set out in full at 119 F. Supp. 227 (W.D. Texas 1954).

In *Abbott v. United States*, 239 F. 2d 310 (5th Cir. 1956), the court stated at p. 314,

“ . . . [it is] . . . immaterial whether the probable, likely use of the mails was contemplated either at the outset or during the performance of the scheme . . . [citation] . . . The statute forbids the *use* of the mails as the means of consummating frauds, and if the mail is used in its actual execution, it matters not whether it was intended or anticipated . . . [citing cases] . . .” (Emphasis by the court.)

The vital thing is *use* of the mails (*Abbott*), and it does not matter whether or not one actually *intends* to so use the mails (*Pereira*). Since one therefore can violate the statute without even intending to use the mails, it is difficult to follow why, as Appellant argues, he must be charged with knowledge of such use.

Knowledge of use of the mails is not an element of the offense, and its omission from the Information herein was harmless. Moreover, as the above cases point out, “knowingly” causing the mails to be used may be the farthest thing from a person’s mind—yet he can fall under the ban of the statute.

POINT II. THE EVIDENCE FULLY SUPPORTS THE VERDICT.

Appellant argues, in three additional points (Op. Br. 12 to 17), that in various particulars the evidence

was insufficient, although Appellant does not stress these points strongly.

Specifically, Appellant argues that the evidence failed to show a fraudulent scheme. Appellant mentions that no personal gain was realized, although admitting that none was necessary. He argues, however, that the lack of any financial gain implies a lack of fraudulent scheme.

But the success or failure of the scheme has nothing to do with the existence of a scheme to defraud. *United States v. Feldman*, 136 F. 2d 394 (2d Cir. 1943).

In *United States v. Broxmeyer*, 192 F. 2d 230, 232 (2d Cir. 1951), the court made the following comment appropriate to the case at bar:

“He [the defendant] insists that intent to defraud was not proved and that, since intent is an essential element . . . [of § 1341] . . . , his conviction cannot stand. . . . The Government put in persuasive evidence showing his desperate need at this time for cash, and his frantic efforts to obtain it before the deposit of these checks. The fact that . . . [the defendant] . . . was the unfortunate victim of his own financial manipulations, or that he would have paid these checks if his check-cashing chain had not broken, does not alter his intent to defraud, if he had no reason to believe that his legitimate sources of income would suffice to make the checks good.”

Appellant next contends that the evidence failed to show that he intended the mails to be used, and that any scheme involved was contemplated before the mails were used.

The first of these contentions is of course answered by *Periera v. United States*, 347 U.S. 1 (1954), and by *Stevens v. United States*, 227 F. 2d 5, 8 (8th Cir. 1955), where the court stated, "It is obvious from a reading of the statute that it was not necessary that . . . [the defendant] . . . himself deposited the checks or cash letters in the mail. It is sufficient that he caused it to be done."

The second of these contentions—that the scheme was completed before the mails were used—is also without merit. *Stevens v. United States*, *supra*; *United States v. Lowe*, 115 F. 2d 596 (7th Cir. 1941); *Deschenes v. United States*, 224 F. 2d 687 (10th Cir. 1955). *Kann v. United States*, 323 U.S. 88 (1944) had very different facts and its scope was self-limiting, and was carefully so limited and distinguished in *United States v. Sheridan*, 329 U.S. 379 (1946).

The evidence "must be viewed in the light most favorable to support the judgment." *Williams et al. v. United States*, 9th Cir. (Dec. 21, 1959), citing *Glasser v. United States*, 315 U.S. 60 (1942); *Robinson v. United States*, 262 F. 2d 645 (9th Cir. 1959). Even without such principle, Appellant's position is untenable. A cursory review of the record establishes beyond any doubt the pattern set up by the checks actually kited, and the use of the mails; the fact that the defendant knew and intended what he was doing—he said so on the witness stand; the fact that he was kiting checks—he admitted it; the fact that his kite was intentionally devised to provide temporary credit—he said so on the witness stand.

Appellee submits that these contentions by Appellant are completely without merit.

CONCLUSION.

The appeal fails to show any grounds sufficient for reversal.

Dated, Honolulu, Hawaii,
January 26, 1960.

Respectfully submitted,

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No. 16530

**United States
Court of Appeals**
for the Ninth Circuit.

B. A. WILLIAMS, II,

Appellant,

-VS-

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

FILED

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APPELLANT'S REPLY BRIEF

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No. 16530

United States
Court of Appeals
for the Ninth Circuit.

B. A. WILLIAMS II,

Appellant,

-VS-

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

APPELLANT'S REPLY BRIEF

APPELLEE'S STATEMENT OF THE CASE

Appellant makes the following observations with
regard to the statement of the case as mentioned in the

brief filed by the United States. (Appellee's Brief, pp. 1-6)

The Government states that the Information here "followed form 3 of the sample forms attached to the Federal Rules of Civil Procedure, and therefore did not allege that Appellant "knowingly" caused the mails to be used." (Brief, p. 3). It is submitted that the use of a Form in drafting an Information charging a crime carries no weight in establishing the sufficiency of an Information. The word "knowingly" is in the statute under which Appellant was here charged. (Appellant's Opening Brief, p. 9). Can it be assumed that the Congress had an intent that the term should mean nothing when the statute was enacted many years ago and reenacted from time to time?

The Government stresses an alleged admission by Appellant that he was engaged in check kiting (Brief, p. 3, p. 6), and refers to Appellant's statements to a Government witness, Klenske, at pp. 61 and 62 of the Record in the following language:

"A bank of Hawaii official testified that the Appellant stated to him that Appellant had been conducting a "check kite" during the period alleged (R. 61 and 62)."

An examination of the Record (bottom p. 61 and top p. 62, pp. 138-139) shows that the words relied

on by the Government were substantially those of the Government witness himself insofar as use of the term "kiting" is concerned.

Referring to the Government's discussion (Brief, p. 4) of the dates of certain checks as being prior to the date (April 24, 1958) when Appellant was advised by his Seattle manager, Mr. Doing, that \$46,000.00 was going to be deposited for Appellant there, it is submitted that the dates as appearing on the checks themselves are meaningless. Appellant, in order to mollify his creditors, was obviously pre-dating and post-dating checks from time to time (Record, p. 147).

APPELLEE'S ARGUMENT

POINT I

Appellee relies heavily on Pereira v United States, 347 U.S. 1, 8, (1954) (Brief, p. 6-7). An examination of that case, however, reveals that the Information therein was not attacked on appeal, and the case, therefore, can be distinguished from the case at bar on that ground. Nor are the facts in Pereira even remotely parallel to those here.

The case of Moffitt v United States, 154 F 2d 402 (10th Cir. 1946) contains instructive language as to

kind of knowledge a defendant charged with mail fraud under the statute must have as to the use of the mails. At page 406 the Court states:

"By his act of depositing the check for collection, he (the defendant) constituted the bank his agent in transmitting the check to the bank on which it was drawn for payment. He also knew that the ordinary and usual method of transmitting such an item was by use of the mails. He also knew that the ordinary and usual method of notifying the collecting bank of payment was by use of the mails. This he must have known from the fact that he was informed that it would be about ten days before he could check against the deposit." (Emphasis added)

Nowhere in the record in the instant case is there any evidence whatever that Appellant was informed that there would be a delay before he could check against the several deposits detailed in the Information.

Appellee points out (Brief, p. 8) that the trial court did use the word knowingly in its charge to the jury. This is certainly recognition that the element of knowledge of the use of the mails in the carrying out of a fraudulent scheme is a necessary element of the offense charged, but it cannot cure the omission in the Information.

1955) is cited by the Government in connection with another point at page 11 of the Government's brief. That case involved a check kiting scheme carried on by defendant utilizing some banks in Iowa and with the complicity of a bank official. As stated by the Court, p. 6:

"Clarence Orville Stevens, the Appellant, was charged with willfully and knowingly devising a scheme to defraud the Cambridge State Bank." (Emphasis added)

No such charge is contained in the Information upon which Appellant was here tried.

U. S. v Weisman, 83 Fed. 2d 470 (CCA 2 - 1936) cited by Appellee in Brief, (p. 7) involved a mail fraud indictment employing the terms "unlawfully, willfully and knowingly". One question raised there was that of variance between the indictment and the trial court's charge to the jury omitting such terms. That question is not involved in the case at bar. Appellant does not complain of the trial court's charge on this point, but does attack the Information as being fatally defective for omitting the vital statutory term "knowingly". Weisman is also different on its facts as it involved the sending of letters through the mails in connection with a swindle whereby the defendant obtained hundreds of thousands of dollars

for his own use.

In Webb v United States, 191 Fed. 2d, 512 (10th Cir. 1951) cited by Appellee, (Brief, p. 8) the indictment set forth in great detail a fraudulent scheme whereby defendant obtained mail orders and received payments which he did not return for scarce merchandise he could not furnish. The indictment alleged that defendant personally placed post cards soliciting orders for such merchandise in the mails. The court held that such allegations were sufficient to allege knowing use of the mails, even though the statutory language itself was not employed. No such situation appears in the case at bar.

In neither Kreuter v U. S., 218 Fed. 2d, 532 (5th Cir. 1955); or Abbott vs. U. S., 239 Fed. 2d 310 (5th Cir. 1956), cited by Appellee (pp. 8-9), were the indictments or Informations attacked as insufficient as here. Both cases involved actual swindles whereby defendants obtained money or property of value through fraudulent schemes involving use of the mails.

APPELLEE'S ARGUMENT

POINT 2

The statement made by Appellee (Brief, p. 10)

that "the success or failure of the scheme has nothing to do with the existence of a scheme to defraud" may hold water as a generality. However, the case of U. S. v Feldman, 136 Fed. 2d 394 (2nd Cir. 1943) cited by Appellee in support of such statement clearly showed a successful scheme - one victim was bilked to pay off another. (Opinion, p. 396).

Appellee in arguing that the evidence was sufficient to support the verdict (Brief, p. 10), cites U. S. v Broxmeyer, 192 Fed. 2d 230 (2nd Cir. 1951), where a guilty defendant "had no reason to believe that his legitimate sources of income would suffice to make the checks good". Again, such is not the situation here. The record again and again shows that Appellant Williams had every reason to believe that some \$46,000.00 had been realized from operations of his Seattle office, (Record, p. 111) and other funds were being raised from the sale of leases. (Record, p. 61).

In conclusion it is emphasized that in all of the cases cited by Appellee there was something more than the mechanical use of the mails by a bank in forwarding checks for collection. Actual swindles were perpetrated by the several defendants, fictitious names were used, letters and postcards were mailed to "sucker" lists, etc. None of these or similar

"con-game" elements are present here.

For the reasons set forth hereinabove and in Appellant's Opening Brief, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

ARTHUR A. BROOKS, JR.

Attorney for Appellant,

B. A. WILLIAMS II.

No. 16531 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REX BATY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 16531
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM REX BATY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On August 13, 1958, the Federal Grand Jury in and for the Southern District of California indicted the appellant in six counts for unlawfully and fraudulently causing to be transported in interstate commerce falsely made and forged checks knowing checks to be falsely made and forged in violation of Title 18 U. S. C., Section 2314 [Clk. Tr. 2-4].¹

Upon arraignment and a plea of not guilty appellant was tried by jury and convicted of Counts One, Two Three, and Four of the indictment on October 20, 1958 [Clk. Tr. 17] [T. R. 424].²

¹Clk. Tr. refers to the Clerk's Transcript of Record.

²T. R. refers to the Transcript of Record, of the Court Reporter.

The sentence was imposed by the Court on November 10, 1958, under which the appellant was committed to the custody of the Attorney General for a period of 18 months on Count One, 18 months on Count Two, and 18 months on Count Three, said sentence to run consecutively. The imposition of sentence was suspended on Count Four and appellant placed on probation for a period of 5 years, which period is to commence after release from custody [Clk. Tr. 18] [T. R. 430].

The jurisdiction of the District Court is predicated upon Title 18, U. S. C., Section 3231, and Title 18, U. S. C., Section 2314. Jurisdiction of this Court rests pursuant to Title 28, U. S. C., Sections 1291 and 1294.

II.

STATUTES INVOLVED.

The indictment in this case was brought under Title 18, U. S. C., Section 2314, which provides in pertinent part as follows:

“Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce, any falsely made, forged, . . . securities, knowing the same to have been falsely made, forged. . . .

“Shall be fined not more than \$10,000 or imprisoned not more than 10 years or both.”

Also pertinent is Title 18, U. S. C., Section 2(b) which provides as follows:

“Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”

III.

STATEMENT OF THE CASE.

Appellant was indicted on August 13, 1958, upon which he was arraigned and pleaded not guilty. After a motion to dismiss the indictment [Clk. Tr. 5], appellant was tried by jury.

A motion for acquittal was made on behalf of defendant at the end of the Government's case in chief [T. R. 213-216] and renewed after all the evidence had been submitted [T. R. 359]. The court denied both motions [T. R. 216, 359].

The jury, having found appellant guilty on Counts One, Two, Three, and Four, sentence was imposed by the Court on November 10, 1958.

Notice of appeal was filed by the appellant on November 13, 1958 [T. R. 21-22].

Appellant, in his brief, argues the following points:

1. The Court erred in denying the motion of appellant to dismiss the indictment and in denying the motions for a judgment of acquittal on the basis that interstate transportation was not shown.

2. The Court erred on instructions to the jury as to transportation.

3. The Court should have permitted an inspection of a report pursuant to Section 3500, Title 18, U. S. C.

IV.

STATEMENT OF THE FACTS.

Appellant resided at 51 West Arbor Street, Long Beach, California, with Mr. L. S. Sherwood, an elderly gentleman, Mrs. Alice Saling, and Mrs. Bonnie Brummer [T. R. 88, 224]. Mr. L. S. Sherwood maintained a checking account at the Farmers Bank of Emden, Emden, Missouri, and drew checks thereon, although residing in Long Beach, California [T. R. 156-157].

Approximately in May, 1958, appellant began cashing checks payable to himself bearing the signature "L. S. Sherwood" drawn on the Farmers Bank of Emden, Emden, Missouri, at Yarbrough's Market, 5318 Long Beach Boulevard, Long Beach, California, [T. R. 124-128, 207-208]. Six of these checks were not signed by Mr. L. S. Sherwood [T. R. 89, 120, 121], and upon an examination by a handwriting expert, the checks were found to be simulated forgeries of L. S. Sherwood's authentic signatures [T. R. 166, 182]. The expert further testified that the appellant was not eliminated as a possible writer of these forged signatures [T. R. 173, 181], although the actual forger could not be identified [T. R. 182-183].

No authorization had been given by Mr. Sherwood to appellant or to anyone else to sign his name on these checks [T. R. 94].

Appellant denied forging the signature "L. S. Sherwood" on any of the checks [T. R. 226-230] contending that he had received the forged checks from Mrs. Alice

Saling with the signature "L. S. Sherwood" already thereon [T. R. 235]. The latter assertion was negated by Mrs. Saling [T. R. 329].

In a conversation with Federal Bureau of Investigation Agent Isadore Mann, the appellant initially denied any knowledge of the checks in question. Subsequently, however, he admitted that he had forged the signature "L. S. Sherwood" on four of the checks. [T. R. 186, 193, 194, 317]. Additionally, appellant offered to make restitution on these checks [T. R. 320]. Federal Bureau of Investigation Agent Richard Nelson, who was present at the conversation, corroborated this testimony [T. R. 337-340]. Naturally, appellant completely denied the making of these admissions or offers of restitution [T. R. 294-296].

After the forged checks were presented for payment at the local banks in Long Beach, California, they eventually were forwarded to the Farmers Bank of Emden, Emden, Missouri [T. R. 151-154] where they were honored by the Farmers Bank of Emden [T. R. 155-156, 159].

V.

ARGUMENT.

A. The Trial Court Did Not Err in Denying Appellant's Motion to Dismiss Indictment or in Denying the Motions for Acquittal.

1. The Legislative Intent Was to Correlate Title 18, U. S. C., Section 2314 With Title 18, U. S. C., Section 2.

Appellant's contention apparently is that Title 18, U. S. C., Section 2314, does not prohibit the causing of forged securities to be transported in interstate commerce with the requisite intent.

As enacted in 1940 as Title 18, U. S. C., Section 415³, the word "transport" was in each case followed by the words "or cause to be transported." However, on June 25, 1948, the effective date of the present section, Title 18, U. S. C., Section 2314, the words "or cause to be transported" were deleted. A perusal of the pertinent reviser's note would indicate that;

"Reference to persons causing or procuring was omitted as unnecessary in view of the definition of 'Principal' in Section 2 of this Title."

Reviser's Note, Title 18, U. S. C., Section 2314.

Coincidentally, on the same date of the deletion and enactment of Title 18, U. S. C., Section 2314, Title 18, U. S. C., Section 2 was amended to add 2(b) which, upon amendment in 1951, now reads as follows:

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would

³Title 18, U. S. C. 1940 ed. Section 415 (May 22, 1934, Chapter 333, Section 3, 48 Stat. 794; Aug. 3, 1939, Chapter 413, Section 1, 53 Stat. 1178).

be an offense against the United States is punishable as a principal.”

The reviser’s note to this section comments that:

“Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as ‘causes or procures.’ ”

Continuing, the note relates:

“The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who ‘aids, abets, counsels, commands, induces, or procures’ another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States.” Reviser’s Note, Title 18, U. S. C., Section 2. Based on Title 18, U. S. C. 1940 Ed. Section 550, March 4, 1909, Chapter 321, Section 332, 35 Stat. 1152 [Derived from R. S. Sections 5323, 5427].

See:

Pereira v. United States, 202 F. 2d 830, 836 (5th Cir. 1953) affirmed 347 U. S. 1 (1954).

As it can readily be seen, there was no intention whatsoever to narrow the effect of Title 18, U. S. C., 2314, but rather to make the section more concise.

The Supreme Court of the United States has expressly stated that:

“ . . . to constitute a violation of these provisions, it is not necessary to show that petitioner actually mailed or transported anything themselves, it is sufficient if they caused it to be done.”

Pereira v. United States, 347 U. S. 1, 8 (1954).

And further:

“When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso Bank for collection he ‘caused’ it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send this check across state lines.” (347 U. S. 1, 9 (1954) citing *United States v. Sheridan*, 329 U. S. 379 (1946) which appellant calls no longer authoritative.)

Similarly, the United States Court of Appeals for the Ninth Circuit, in a factual situation closely related to the case at bar, ruled that there would be a violation of Title 18, U. S. C., Section 2314, where one knowingly cashed a forged check on an out-of-state bank.

United States v. Bremer, 207 F. 2d 247 (9th Cir., 1953).

In a Second Circuit case, the Court found *United States v. Sheridan*, *supra*, controlling and overruled their prior decision of *United States v. Paglia*, 190 F. 2d 445 (2d Cir., 1951).

United States v. Taylor, 217 F. 2d 397 (2nd Cir., 1954).

Numerous other cases are in accord and it can be considered well settled that Title 18, U. S. C., 2314 prohibits a person knowingly cashing in one state a forged check drawn upon a bank in another state.

United States v. Sheridan, 329 U. S. 379 (1946);
Pereira v. United States, 202 F. 2d 830 (5th Cir., 1953) affirmed 347 U. S. 1 (1954);

Davis v. United States, 237 F. 2d 794 (9th Cir., 1956) *cert. den.* 352 U. S. 961 (1957);
United States v. Bremer, 207 F. 2d 247 (9th Cir., 1953);
United States v. Taylor, 217 F. 2d 397 (2nd Cir., 1954);
Walker v. United States, 154 Fed. Supp. 648 (D. C. N. J. 1957), affirmed 251 F. 2d 616 (3rd Cir., 1958), *cert. den.* 357 U. S. 921 (1958);
Hubsch v. United States, 256 F. 2d 820 (5th Cir., 1958);
Rickey v. United States, 242 F. 2d 583 (5th Cir., 1957);
Roddy v. United States, 262 F. 2d 308 (7th Cir., 1958), *cert. den.* 359 U. S. 949 (1959).

With almost complete unanimity the various jurisdictions have held that it was a violation of Title 18, U. S. C., Section 2314 to cause forged securities to be transported in interstate commerce with the requisite knowledge and intent. To proffer a contrary position against this mountain of authority is bold indeed; especially, when the apparent totality of the position is based upon a case which has been overruled in its own jurisdiction on precisely this point.

2. There Is Substantial Evidence to Support the Verdict of the Trial Court.

Although the appellant has not directly specified as error the sufficiency of evidence to support the verdict of the trial court, the point has been brought to the attention of the court.

At the outset the appellant is faced with the proposition that the Court of Appeals cannot substitute its judg-

ment for the trial court in finding disputed facts, and a verdict supported by substantial evidence is binding on the reviewing court.

Glasser v. United States, 315 U. S. 60, 80 (1941);
Sandez v. United States, 239 F. 2d 239 (9th Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), *cert. den.* 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), *cert. den.* 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952).

It is apparent from the record of the proceedings that there is substantial evidence to support the verdict. The checks in question were not signed by Mr. L. S. Sherwood, the true maker-owner of the checking account [T. R. 89, 120, 121], nor had he given authority to appellant or anyone else to sign his name to the checks [T. R. 94]. An analysis of the checks by a handwriting expert revealed the signature to be simulated forgeries [R. T. 166, 182]. These forged checks were drawn on the Farmers Bank of Emden, Emden, Missouri, where they were forwarded and honored [T. R. 155-156, 159] after the appellant had cashed the checks at a local market in Long Beach, California [T. R. 124-128, 207-208]. The possibility of a forgery was brought to the attention of the appellant by Johnny Yarbrough, the market owner [T. R. 137] and appellant also testified that he thought the procedure by which he was given the checks was unusual [T. R. 239, 266-267]. Furthermore, the appellant admitted to the Agents of the Federal Bureau of Investigation that he had forged the signatures on four of the

checks in question [T. R. 186, 193, 194, 317, 337-340] and had offered to make restitution thereon [T. R. 320].

The effect of the evidence is conclusive that the appellant caused to be transported in interstate commission forged checks with knowledge that they were forged. Such evidence as was produced is more than substantial to support the verdict rendered in the trial court.

B. The Trial Court Did Not Commit Error on Its Instruction to the Jury on the Question of Transportation of Forged Securities in Interstate Commerce.

The exact language of a requested instruction need not be adopted, but it is enough that they are or have already been given in substance.

Sugarman v. United States, 249 U. S. 182, 185 (1919);

Shibley v. United States, 237 F. 2d 327 (9th Cir., 1956), *cert. den.* 352 U. S. 873 (1956), rehearing *den.* 352 U. S. 919 (1956);

Herzog v. United States, 226 F. 2d 561 (9th Cir., 1955), *cert. den.* 352 U. S. 844 (1956).

A very careful reading of the transcript of the proceedings would reveal that the trial court in the instant case went even further and gave the entire text of appellant's Instruction Number Two. On page 416 of the Transcript of the Record the following was recorded:

"MR. NORRIS: . . . defendant does object to the court's ruling excluding—rejecting the defendant's requested Instruction No. 2 on the ground that—(whereupon the following proceedings were had in the presence and hearing of the jury:)

“THE COURT: You are instructed that you cannot return a verdict of guilty on any count unless you find beyond any reasonable doubt that the defendant willfully cashed the check described in that count to be transported in interstate commerce. Willfully causing the check to be so transported means that the act of transporting the check in interstate commerce was an act that the defendant wished to bring about, that he sought by his action to make it succeed. Or that in the normal course of events, which would be within the contemplation of the defendant, the transportation in interstate commerce would be a necessary adjunct.”

A summary disposition may be made of the appellant's contention that the trial court's instruction that “appellant was guilty if he ‘caused’ the transportation” was incorrect. It need only be reiterated that since the present status of the law is as propounded by the Court in its instructions to the jury, there is no valid basis for the appellant's contention.

See:

Pereira v. United States, *supra* (and discussion under subheading A of this Argument).

C. Ruling Upon Motion to Inspect Report Pursuant to Title 18, U. S. C., 3500 Was Properly Not Made by the Trial Court.

A contention not urged in the District Court cannot be urged for the first time on appeal.

Crutchfield v. United States, 142 F. 2d 170 (9th Cir., 1943);

Trice v. United States, 211 F. 2d 513 (9th Cir., 1954), *cert. den.* 348 U. S. 900 (1954);

Davis v. United States, 237 F. 2d 794 (9th Cir., 1956), *cert. den.* 352 U. S. 961 (1956);
Zacher v. United States, 227 F. 2d 219 (8th Cir., 1955), *cert. den.* 350 U. S. 993 (1956).

In the instant case, although the Motion for Written Reports had initially been presented to the trial court [T. R. 205] before any ruling could be made thereon by the court, the motion was withdrawn by the appellant [T. R. 213]. Therefore, the point not having been urged in the trial court, it is obviously out of order before this Court.

However, assuming the motion was properly before this Court for consideration, the contention is yet without merit.

The latest interpretation of Title 18, U. S. C., Section 3500 was made recently by the Supreme Court of the United States in *Palermo v. United States*, Supreme Court of United States No. 471-October Term, 1958, Decided June 22, 1959. After ruling that Title 18, U. S. C., Section 3500 exclusively determined the procedure in the production of statements of a Government witness made to an agent of the Government, the court further affirmed the trial court and the Court of Appeals in holding that the summary made by the Internal Revenue Service Agent was not a "statement" within the meaning of paragraph (e) of this Section.

The Court stated:

"The act's major concern is with limiting and regulating defense access to Government papers, and it is designed to deny such access to these statements which do not satisfy the requirement of (e), or do not relate to the subject matter of the witness' testi-

mony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them."

The contention that the report should be produced because "the report might have shown that the appellant did not admit signing the name 'L. S. Sherwood' to the check," would seem to indicate that the appellant only wanted to see the report to determine if there was a "statement" indicating a lack of an admission. Seemingly, the appellant is attempting to do precisely what the Court states ought not to be allowed.

VI. CONCLUSION.

1. The motion to dismiss the indictment and motions for acquittal were properly denied.
2. The instructions given to the jury were proper.
3. The report need not have been produced pursuant to Title 18, U. S. C., Section 3500.

Respectfully submitted,

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No. 16534

United States
Court of Appeals
for the Ninth Circuit

TIME OIL CO., a corporation, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

No. 16531 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REX BATY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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FILED

OCT - 8 1959

PAUL P. O'BRIEN, CLERK

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No. 16531

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REX BATY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On August 13, 1958, the Federal Grand Jury in and for the Southern District of California indicted the appellant in six counts for unlawfully and fraudulently causing to be transported in interstate commerce falsely made and forged checks knowing checks to be falsely made and forged in violation of Title 18 U. S. C., Section 2314 [Clk. Tr. 2-4].¹

Upon arraignment and a plea of not guilty appellant was tried by jury and convicted of Counts One, Two Three, and Four of the indictment on October 20, 1958 [Clk. Tr. 17] [T. R. 424].²

¹Clk. Tr. refers to the Clerk's Transcript of Record.

²T. R. refers to the Transcript of Record, of the Court Reporter.

The sentence was imposed by the Court on November 10, 1958, under which the appellant was committed to the custody of the Attorney General for a period of 18 months on Count One, 18 months on Count Two, and 18 months on Count Three, said sentence to run consecutively. The imposition of sentence was suspended on Count Four and appellant placed on probation for a period of 5 years, which period is to commence after release from custody [Clk. Tr. 18] [T. R. 430].

The jurisdiction of the District Court is predicated upon Title 18, U. S. C., Section 3231, and Title 18, U. S. C., Section 2314. Jurisdiction of this Court rests pursuant to Title 28, U. S. C., Sections 1291 and 1294.

II.

STATUTES INVOLVED.

The indictment in this case was brought under Title 18, U. S. C., Section 2314, which provides in pertinent part as follows:

“Whoever, with unlawful or fraudulent intent, transports in interstate . . . commerce, any falsely made, forged, . . . securities, knowing the same to have been falsely made, forged. . . .

“Shall be fined not more than \$10,000 or imprisoned not more than 10 years or both.”

Also pertinent is Title 18, U. S. C., Section 2(b) which provides as follows:

“Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”

III.

STATEMENT OF THE CASE.

Appellant was indicted on August 13, 1958, upon which he was arraigned and pleaded not guilty. After a motion to dismiss the indictment [Clk. Tr. 5], appellant was tried by jury.

A motion for acquittal was made on behalf of defendant at the end of the Government's case in chief [T. R. 213-216] and renewed after all the evidence had been submitted [T. R. 359]. The court denied both motions [T. R. 216, 359].

The jury, having found appellant guilty on Counts One, Two, Three, and Four, sentence was imposed by the Court on November 10, 1958.

Notice of appeal was filed by the appellant on November 13, 1958 [T. R. 21-22].

Appellant, in his brief, argues the following points:

1. The Court erred in denying the motion of appellant to dismiss the indictment and in denying the motions for a judgment of acquittal on the basis that interstate transportation was not shown.

2. The Court erred on instructions to the jury as to transportation.

3. The Court should have permitted an inspection of a report pursuant to Section 3500, Title 18, U. S. C.

IV.

STATEMENT OF THE FACTS.

Appellant resided at 51 West Arbor Street, Long Beach, California, with Mr. L. S. Sherwood, an elderly gentleman, Mrs. Alice Saling, and Mrs. Bonnie Brummer [T. R. 88, 224]. Mr. L. S. Sherwood maintained a checking account at the Farmers Bank of Emden, Emden, Missouri, and drew checks thereon, although residing in Long Beach, California [T. R. 156-157].

Approximately in May, 1958, appellant began cashing checks payable to himself bearing the signature "L. S. Sherwood" drawn on the Farmers Bank of Emden, Emden, Missouri, at Yarbrough's Market, 5318 Long Beach Boulevard, Long Beach, California, [T. R. 124-128, 207-208]. Six of these checks were not signed by Mr. L. S. Sherwood [T. R. 89, 120, 121], and upon an examination by a handwriting expert, the checks were found to be simulated forgeries of L. S. Sherwood's authentic signatures [T. R. 166, 182]. The expert further testified that the appellant was not eliminated as a possible writer of these forged signatures [T. R. 173, 181], although the actual forger could not be identified [T. R. 182-183].

No authorization had been given by Mr. Sherwood to appellant or to anyone else to sign his name on these checks [T. R. 94].

Appellant denied forging the signature "L. S. Sherwood" on any of the checks [T. R. 226-230] contending that he had received the forged checks from Mrs. Alice

Saling with the signature "L. S. Sherwood" already thereon [T. R. 235]. The latter assertion was negated by Mrs. Saling [T. R. 329].

In a conversation with Federal Bureau of Investigation Agent Isadore Mann, the appellant initially denied any knowledge of the checks in question. Subsequently, however, he admitted that he had forged the signature "L. S. Sherwood" on four of the checks. [T. R. 186, 193, 194, 317]. Additionally, appellant offered to make restitution on these checks [T. R. 320]. Federal Bureau of Investigation Agent Richard Nelson, who was present at the conversation, corroborated this testimony [T. R. 337-340]. Naturally, appellant completely denied the making of these admissions or offers of restitution [T. R. 294-296].

After the forged checks were presented for payment at the local banks in Long Beach, California, they eventually were forwarded to the Farmers Bank of Emden, Emden, Missouri [T. R. 151-154] where they were honored by the Farmers Bank of Emden [T. R. 155-156, 159].

V.
ARGUMENT.

A. The Trial Court Did Not Err in Denying Appellant's Motion to Dismiss Indictment or in Denying the Motions for Acquittal.

1. The Legislative Intent Was to Correlate Title 18, U. S. C., Section 2314 With Title 18, U. S. C., Section 2.

Appellant's contention apparently is that Title 18, U. S. C., Section 2314, does not prohibit the causing of forged securities to be transported in interstate commerce with the requisite intent.

As enacted in 1940 as Title 18, U. S. C., Section 415³, the word "transport" was in each case followed by the words "or cause to be transported." However, on June 25, 1948, the effective date of the present section, Title 18, U. S. C., Section 2314, the words "or cause to be transported" were deleted. A perusal of the pertinent reviser's note would indicate that;

"Reference to persons causing or procuring was omitted as unnecessary in view of the definition of 'Principal' in Section 2 of this Title."

Reviser's Note, Title 18, U. S. C., Section 2314.

Coincidentally, on the same date of the deletion and enactment of Title 18, U. S. C., Section 2314, Title 18, U. S. C., Section 2 was amended to add 2(b) which, upon amendment in 1951, now reads as follows:

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would

³Title 18, U. S. C. 1940 ed. Section 415 (May 22, 1934, Chapter 333, Section 3, 48 Stat. 794; Aug. 3, 1939, Chapter 413, Section 1, 53 Stat. 1178).

be an offense against the United States is punishable as a principal.”

The reviser’s note to this section comments that:

“Section 2(b) is added to permit the deletion from many sections throughout the revision of such phrases as ‘causes or procures.’ ”

Continuing, the note relates:

“The section as revised makes clear the legislative intent to punish as a principal not only one who directly commits an offense and one who ‘aids, abets, counsels, commands, induces, or procures’ another to commit an offense, but also anyone who causes the doing of an act which if done by him directly would render him guilty of an offense against the United States.” Reviser’s Note, Title 18, U. S. C., Section 2. Based on Title 18, U. S. C. 1940 Ed. Section 550, March 4, 1909, Chapter 321, Section 332, 35 Stat. 1152 [Derived from R. S. Sections 5323, 5427].

See:

Pereira v. United States, 202 F. 2d 830, 836 (5th Cir. 1953) affirmed 347 U. S. 1 (1954).

As it can readily been seen, there was no intention whatsoever to narrow the effect of Title 18, U. S. C., 2314, but rather to make the section more concise.

The Supreme Court of the United States has expressly stated that:

“ . . . to constitute a violation of these provisions, it is not necessary to show that petitioner actually mailed or transported anything themselves, it is sufficient if they caused it to be done.”

Pereira v. United States, 347 U. S. 1, 8 (1954).

And further:

“When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso Bank for collection he ‘caused’ it to be transported in interstate commerce. It is common knowledge that such checks must be sent to the drawee bank for collection, and it follows that Pereira intended the El Paso bank to send this check across state lines.” (347 U. S. 1, 9 (1954) citing *United States v. Sheridan*, 329 U. S. 379 (1946) which appellant calls no longer authoritative.)

Similarly, the United States Court of Appeals for the Ninth Circuit, in a factual situation closely related to the case at bar, ruled that there would be a violation of Title 18, U. S. C., Section 2314, where one knowingly cashed a forged check on an out-of-state bank.

United States v. Bremer, 207 F. 2d 247 (9th Cir., 1953).

In a Second Circuit case, the Court found *United States v. Sheridan*, *supra*, controlling and overruled their prior decision of *United States v. Paglia*, 190 F. 2d 445 (2d Cir., 1951).

United States v. Taylor, 217 F. 2d 397 (2nd Cir., 1954).

Numerous other cases are in accord and it can be considered well settled that Title 18, U. S. C., 2314 prohibits a person knowingly cashing in one state a forged check drawn upon a bank in another state.

United States v. Sheridan, 329 U. S. 379 (1946);
Pereira v. United States, 202 F. 2d 830 (5th Cir., 1953) affirmed 347 U. S. 1 (1954);

- Davis v. United States*, 237 F. 2d 794 (9th Cir., 1956) *cert. den.* 352 U. S. 961 (1957);
United States v. Bremer, 207 F. 2d 247 (9th Cir., 1953);
United States v. Taylor, 217 F. 2d 397 (2nd Cir., 1954);
Walker v. United States, 154 Fed. Supp. 648 (D. C. N. J. 1957), affirmed 251 F. 2d 616 (3rd Cir., 1958), *cert. den.* 357 U. S. 921 (1958);
Hubsch v. United States, 256 F. 2d 820 (5th Cir., 1958);
Rickey v. United States, 242 F. 2d 583 (5th Cir., 1957);
Roddy v. United States, 262 F. 2d 308 (7th Cir., 1958), *cert. den.* 359 U. S. 949 (1959).

With almost complete unanimity the various jurisdictions have held that it was a violation of Title 18, U. S. C., Section 2314 to cause forged securities to be transported in interstate commerce with the requisite knowledge and intent. To proffer a contrary position against this mountain of authority is bold indeed; especially, when the apparent totality of the position is based upon a case which has been overruled in its own jurisdiction on precisely this point.

2. There Is Substantial Evidence to Support the Verdict of the Trial Court.

Although the appellant has not directly specified as error the sufficiency of evidence to support the verdict of the trial court, the point has been brought to the attention of the court.

At the outset the appellant is faced with the proposition that the Court of Appeals cannot substitute its judg-

ment for the trial court in finding disputed facts, and a verdict supported by substantial evidence is binding on the reviewing court.

Glasser v. United States, 315 U. S. 60, 80 (1941);
Sandez v. United States, 239 F. 2d 239 (9th Cir., 1956);

Arena v. United States, 226 F. 2d 227, 229 (9th Cir., 1955), *cert. den.* 350 U. S. 954 (1956);

Schino v. United States, 209 F. 2d 67, 72 (9th Cir., 1953), *cert. den.* 347 U. S. 937 (1954);

Woodward Laboratories v. United States, 198 F. 2d 995, 998 (9th Cir., 1952).

It is apparent from the record of the proceedings that there is substantial evidence to support the verdict. The checks in question were not signed by Mr. L. S. Sherwood, the true maker-owner of the checking account [T. R. 89, 120, 121], nor had he given authority to appellant or anyone else to sign his name to the checks [T. R. 94]. An analysis of the checks by a handwriting expert revealed the signature to be simulated forgeries [R. T. 166, 182]. These forged checks were drawn on the Farmers Bank of Emden, Emden, Missouri, where they were forwarded and honored [T. R. 155-156, 159] after the appellant had cashed the checks at a local market in Long Beach, California [T. R. 124-128, 207-208]. The possibility of a forgery was brought to the attention of the appellant by Johnny Yarbrough, the market owner [T. R. 137] and appellant also testified that he thought the procedure by which he was given the checks was unusual [T. R. 239, 266-267]. Furthermore, the appellant admitted to the Agents of the Federal Bureau of Investigation that he had forged the signatures on four of the

checks in question [T. R. 186, 193, 194, 317, 337-340] and had offered to make restitution thereon [T. R. 320].

The effect of the evidence is conclusive that the appellant caused to be transported in interstate commission forged checks with knowledge that they were forged. Such evidence as was produced is more than substantial to support the verdict rendered in the trial court.

B. The Trial Court Did Not Commit Error on Its Instruction to the Jury on the Question of Transportation of Forged Securities in Interstate Commerce.

The exact language of a requested instruction need not be adopted, but it is enough that they are or have already been given in substance.

Sugarman v. United States, 249 U. S. 182, 185 (1919);

Shibley v. United States, 237 F. 2d 327 (9th Cir., 1956), *cert. den.* 352 U. S. 873 (1956), rehearing *den.* 352 U. S. 919 (1956);

Herzog v. United States, 226 F. 2d 561 (9th Cir., 1955), *cert. den.* 352 U. S. 844 (1956).

A very careful reading of the transcript of the proceedings would reveal that the trial court in the instant case went even further and gave the entire text of appellant's Instruction Number Two. On page 416 of the Transcript of the Record the following was recorded:

"MR. NORRIS: . . . defendant does object to the court's ruling excluding—rejecting the defendant's requested Instruction No. 2 on the ground that—(whereupon the following proceedings were had in the presence and hearing of the jury:)

“THE COURT: You are instructed that you cannot return a verdict of guilty on any count unless you find beyond any reasonable doubt that the defendant willfully cashed the check described in that count to be transported in interstate commerce. Willfully causing the check to be so transported means that the act of transporting the check in interstate commerce was an act that the defendant wished to bring about, that he sought by his action to make it succeed. Or that in the normal course of events, which would be within the contemplation of the defendant, the transportation in interstate commerce would be a necessary adjunct.”

A summary disposition may be made of the appellant's contention that the trial court's instruction that “appellant was guilty if he ‘caused’ the transportation” was incorrect. It need only be reiterated that since the present status of the law is as propounded by the Court in its instructions to the jury, there is no valid basis for the appellant's contention.

See:

Pereira v. United States, supra (and discussion under subheading A of this Argument).

C. Ruling Upon Motion to Inspect Report Pursuant to Title 18, U. S. C., 3500 Was Properly Not Made by the Trial Court.

A contention not urged in the District Court cannot be urged for the first time on appeal.

Crutchfield v. United States, 142 F. 2d 170 (9th Cir., 1943);

Trice v. United States, 211 F. 2d 513 (9th Cir., 1954), *cert. den.* 348 U. S. 900 (1954);

Davis v. United States, 237 F. 2d 794 (9th Cir., 1956), *cert. den.* 352 U. S. 961 (1956);

Zacher v. United States, 227 F. 2d 219 (8th Cir., 1955), *cert. den.* 350 U. S. 993 (1956).

In the instant case, although the Motion for Written Reports had initially been presented to the trial court [T. R. 205] before any ruling could be made thereon by the court, the motion was withdrawn by the appellant [T. R. 213]. Therefore, the point not having been urged in the trial court, it is obviously out of order before this Court.

However, assuming the motion was properly before this Court for consideration, the contention is yet without merit.

The latest interpretation of Title 18, U. S. C., Section 3500 was made recently by the Supreme Court of the United States in *Palermo v. United States*, Supreme Court of United States No. 471-October Term, 1958, Decided June 22, 1959. After ruling that Title 18, U. S. C., Section 3500 exclusively determined the procedure in the production of statements of a Government witness made to an agent of the Government, the court further affirmed the trial court and the Court of Appeals in holding that the summary made by the Internal Revenue Service Agent was not a "statement" within the meaning of paragraph (e) of this Section.

The Court stated:

"The act's major concern is with limiting and regulating defense access to Government papers, and it is designed to deny such access to these statements which do not satisfy the requirement of (e), or do not relate to the subject matter of the witness' testi-

mony. It would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them.”

The contention that the report should be produced because “the report might have shown that the appellant did not admit signing the name ‘L. S. Sherwood’ to the check,” would seem to indicate that the appellant only wanted to see the report to determine if there was a “statement” indicating a lack of an admission. Seemingly, the appellant is attempting to do precisely what the Court states ought not to be allowed.

VI. CONCLUSION.

1. The motion to dismiss the indictment and motions for acquittal were properly denied.
2. The instructions given to the jury were proper.
3. The report need not have been produced pursuant to Title 18, U. S. C., Section 3500.

Respectfully submitted,

LAUGHLIN E. WATERS,
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Chief, Criminal Division,*

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Attorneys for Appellee.*

No. 16534 ✓

United States
Court of Appeals
for the Ninth Circuit

TIME OIL CO., a corporation, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

No. 16534

United States
Court of Appeals
for the Ninth Circuit

TIME OIL CO., a corporation, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court
of the United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 50122

TIME OIL CO.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1953

Aug. 17—Petition received and filed. Taxpayer notified. Fee paid.

Aug. 18—Copy of petition served on General Counsel.

Aug. 17—Request for Circuit hearing in Seattle, Washington, filed by taxpayer. 9/3/53 granted.

Sept. 18—Answer filed by General Counsel.

Sept. 18—Request for hearing in Seattle filed by General Counsel.

Sept. 24—Copy of answer and request served on taxpayer. Seattle.

1955

Mar. 14—Hearing set June 13, 1955, Seattle, Washington.

June 16—Hearing had before Judge Withey on the merits.

—Stipulation of Facts, filed at hearing.
Briefs 9/14/55. Replies 10/14/55.

July 13—Transcript of hearing 6/16/55 filed.

1955

Aug. 18—Brief filed by taxpayer. 9/15/55 copy served.

Sept. 14—Brief filed by General Counsel. 9/15/55 copy served.

Oct. 13—Reply Brief filed by taxpayer. Copy served.

Oct. 14—Reply Brief filed by General Counsel.

Oct. 24—Reply Brief to respondent's reply Brief, filed by taxpayer. Copy served.

1956

Sept. 19—Findings of fact and opinion filed. Withey J.

—Decision will be entered under Rule 50. 9/19/56 served.

Oct. 22—Agreed computation for entry of decision filed.

Oct. 29—Decision entered, Judge Withey, Division 4. 10/30/56 served.

1957

Jan. 14—Bond in the amount of \$217,162.00 approved and filed.

Jan. 14—Petition for review by United States Court of Appeals, Ninth Circuit, filed by petitioner.

Jan. 16—Proof of Service filed.

Jan. 16—Designation of contents of record on appeal with proof of service thereon, filed.

Feb. 15—Transcript of original record sur petition for review sent Clerk, U. S. Ct. of Appeals, 9th Circ.

1958

Sept. 8—Mandate from U.S.C.A. 9th Circ. remanding case to Tax Court for further proceedings, filed.

Sept. 11—Order, that proceedings be set Dec. 3, 1958, Wash. D. C. with right of both parties to submit recomputations on or before that date, entered.

Nov. 18—Joint motion for continuance to Jan. 15, 1959, at Wash. D. C. Granted 11/19/58 to Feb. 18, 1959. Served 11/21/58.

1959

Jan. 27—Order that case is stricken from the motions cal. of Feb. 18, 1959, at Wash. D. C. and continued to the motions cal. of March 4, 1959, at Wash. D. C. on or before which date the parties may submit recomputations, or otherwise, move.

Feb. 27—Resp. computation for entry of decision filed.

Mar. 2—Petr. computation for entry of decision filed.

Mar. 2—Order, that case is stricken from cal. March 4, 1959, Wash. D. C. and continued for further proceedings under the mandate to April 1, 1959, Wash. D. C. Resp. computation filed Feb. 27, 1959 and Petr. computation filed March 2, 1959, are also placed upon that calendar. Served 3/3/59.

Mar. 23—Petr's objections to resp's computation for entry of decision. Served 3/24/59.

1959

Mar. 31—Memo. Brief filed by resp. Served 3/31/59.

Apr. 1—Hearing on further proceedings under the mandate; resp. computation; petr. computation. Referred to Judge Withey.

Apr. 7—Decision entered, Judge Withey. Served 4/8/59.

May 4—Petition for Review by U. S. Ct. of Ap. 9th Circ. filed by petr.

May 5—Proof of Service filed.

May 11—Designation of Contents of Record on Rev. with proof of service thereon, filed.

May 26—Order extending time to file record on rev. and docket pet. for rev. to Aug. 2, 1959.

Tax Court of the United States

Docket No. 50122

THE TIME OIL COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

RESPONDENT'S COMPUTATION FOR
ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to the Tax Court of the United States in compliance with the opinion

and mandate of the United States Court of Appeals for the Ninth Circuit. Said computation shows there are deficiencies in income tax for the taxable year 1949 in the amount of \$32,588.60 and for the taxable year 1950 in the amount of \$22,889.39.

/s/ ARCH M. CANTRALL,
Chief Counsel,
Internal Revenue Service.

Of Counsel: Charles Owen Johnson, Special Attorney, Internal Revenue Service.

STATEMENT OF ACCOUNT

In re: The Time Oil Company
Seattle, Washington

T. C. Docket No. 50122, C.A. 9th

Taxable Years 1949 and 1950

Taxable Year 1949

Income tax liability recomputed in accordance with the opinion of the United States Court of Appeals for the Ninth Circuit filed on July 30, 1958..... \$182,771.78

Original assessments:

Original, Account 4-410045.....	\$120,311.28	
Amended return, Account 8-420206.....	29,871.90	
		<hr/>
		150,183.18

Deficiency which the Tax Court should have determined	\$ 32,588.60
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Income tax assessed:

Original, Account 4-410045.....	\$120,311.28
Amended return, Account 8-420206.....	29,871.90
	<hr/>

Total assessed	\$150,183.18
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Time Oil Company vs.

Statement of Account—(Continued)

Taxable Year 1949—(Continued)

Income tax paid:

March 15, 1950.....	\$ 24,599.46
April 15, 1950, \$5,505.75 less \$27.39 interest	5,478.36
June 15, 1950.....	30,077.82
September 15, 1950.....	30,077.82
November 8, 1950.....	477.94
December 15, 1950.....	29,599.88
August 11, 1950.....	15,184.90
August 22, 1950.....	477.94
November 8, 1950 \$14,935.94 less \$726.88 interest	14,209.06
Total paid	\$150,183.18
Unpaid assessment	None
Income tax liability.....	\$182,771.78
Paid	150,183.18
Deficiency in income tax.....	\$ 32,588.60

Statutory notice mailed June 1, 1953.

Petition filed August 17, 1953.

Taxable Year 1950

Income tax liability recomputed in accordance with the opinion of the United States Court of Appeals for the Ninth Circuit filed on July 30, 1958.....	\$126,752.37
Original tax assessed, Account 7-418035.....	103,862.98
Deficiency which the Tax Court should have deter- mined	\$ 22,889.39
Income tax assessed:	
Original, Account 7-418035.....	\$103,862.98
Income tax paid:	
March 14, 1951.....	\$ 34,983.30
June 15, 1951.....	27,334.48
September 15, 1951.....	20,772.60
December 18, 1951.....	20,772.60
Total paid	\$103,862.98

Statement of Account—(Continued)

Taxable Year 1950—(Continued)

Unpaid assessment	None
Income tax liability.....	\$126,752.37
Paid	103,862.98
Deficiency in income tax.....	\$ 22,889.39

Statutory notice mailed June 1, 1953.

Petition filed August 17, 1953.

STATEMENT

In re: The Time Oil Company
Seattle, Washington

T. C. Docket No. 50122, C.A. 9th

Taxable Years 1949 and 1950

	Income Tax		
Year	Liability	Assessed	Deficiency
1949	\$182,771.78	\$150,183.18	\$32,588.60
1950	126,752.37	103,862.98	22,889.39

In compliance with the request contained in memorandum of the Office of the Chief Counsel dated February 20, 1959, a recomputation has been made in accordance with the opinion of the United States Court of Appeals for the Ninth Circuit filed on July 30, 1958.

Schedule 1

Adjustments to Net Income

	1949	1950
Net income shown in statutory notice of deficiency dated June 1, 1953.....	\$572,462.02	\$413,802.67
Less: Miscellaneous income	4,750.00	
Contributions		6,584.58
Net income recomputed in accordance with the decision of the Tax Court	\$567,712.02	\$407,218.09
Less contributions to profit sharing trust	75,557.59	58,074.14
Corrected net income recomputed in accordance with the opinion of the United States Court of Appeals for the Ninth Circuit	\$492,154.43	\$349,143.95

Time Oil Company vs.

Statement—(Continued)

1949

Schedule 2

Computation of Income Tax

Corrected net income, Schedule 1.....	\$492,154.43
Less net long-term capital gain.....	32,668.50
<hr/>	
Ordinary net income.....	\$459,485.93
Normal tax 24% of \$459,485.93.....	\$110,276.62
Surtax, 14% of \$459,485.93.....	64,328.03
25% of net long-term capital gain of \$32,668.50	8,167.13
<hr/>	
Income tax liability.....	\$182,771.78
Assessed	150,183.18
<hr/>	
Deficiency in income tax.....	\$ 32,588.60

1950

Schedule 3

Computation of Income Tax

Corrected net income, Schedule 1.....	\$349,143.95
Less dividends received credit, 85% of \$19,271.00.....	16,380.35
<hr/>	
Surtax net income.....	\$332,763.60
Less net long-term capital gain.....	48,578.54
<hr/>	
Surtax net income for purpose of alternative tax.....	\$284,185.06
Combined normal tax and surtax:	
42% of \$284,185.06.....	\$119,357.73
Less	4,750.00
<hr/>	
25% of net long-term capital gain of \$48,578.54.....	12,144.64
<hr/>	
Income tax	\$126,752.37
Excess profits tax.....	None
Income tax liability.....	\$126,752.37
Assessed	103,862.98
<hr/>	
Deficiency in income tax.....	\$ 22,889.39

Computation of Allowable Contributions

	<u>1944</u>	<u>1945</u>	<u>1946</u>	<u>1947</u>	<u>1948</u>	<u>1949</u>	<u>1950</u>
Amount of contributions:							
In taxable year	\$ 33,859.84	\$ - 0 -	\$ 1,485.57	\$ - 0 -	\$ 72,814.40	\$ 75,557.59	\$ 58,074.14
Carried over from prior years	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
Primary limitation--15% of covered compensation	\$ 33,859.84	\$ 19,785.30	\$ 22,461.45	\$ 34,475.40	\$ 42,347.54	\$ 51,562.31	\$ 60,000.00
Secondary limitation:							
(a) Twice primary limitation	\$ 67,719.68	\$ 39,570.60	\$ 44,922.90	\$ 68,950.80	\$ 84,695.08	\$ 103,124.62	\$ 120,000.00
(b)(1) Aggregate current and prior limitations	\$ 33,859.84	\$ 53,645.14	\$ 76,106.59	\$ 110,581.99	\$ 152,929.53	\$ 204,491.84	\$ 264,491.84
(2) Aggregate prior deductions	- 0 -	<u>33,859.84</u>	<u>33,859.84</u>	<u>35,345.41</u>	<u>35,345.41</u>	<u>108,159.81</u>	<u>183,717.40</u>
(3) Excess of (b)(1) over (b)(2)	\$ 33,859.84	\$ 19,785.30	\$ 42,246.75	\$ 75,236.58	\$ 117,584.12	\$ 96,332.03	\$ 80,774.44
(c) Lesser of (a) or (b)(3)	\$ 33,859.84	\$ 19,785.30	\$ 42,246.75	\$ 68,950.80	\$ 84,695.08	\$ 96,332.03	\$ 80,774.44
Amount deductible for year:							
(a) Contributions in year	\$ 33,859.84	- 0 -	\$ 1,485.57	- 0 -	\$ 72,814.40	\$ 75,557.59	\$ 58,074.14
(b) Contributions carried over	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -
(c) Total	\$ 33,859.84	- 0 -	\$ 1,485.57	- 0 -	\$ 72,814.40	\$ 75,557.59	\$ 58,074.14
Excess contributions carried over to succeeding years	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -	- 0 -

The computation of the amounts of the contributions shown above for the years 1948 through 1950 is as follows:

Date of Note	Total Amount	Applicable to Year		
		1948	1949	1950
May, 1948	\$ 30,466.86	\$ 30,466.86		
February 28, 1949	66,342.82	42,347.54	\$ 23,995.28	
February 15, 1950	84,568.49		51,562.31	\$ 33,006.18
April 17, 1950	<u>25,067.96</u>			<u>25,067.96</u>
Total		\$ 72,814.40	\$ 75,557.59	\$ 58,074.14

Served March 3, 1959.

[Endorsed]: T.C.U.S. Filed Feb. 27, 1959.

note was actually discharged on April 20, 1949 (Tr. 28) and is therefore deductible at that time.

The second note in the amount of \$66,342.82 was issued February 26, 1949, presumably as a contribution for the year 1948. The record shows (Tr. 29) that the respondent disallowed this as a deduction for petitioner in 1948 and petitioner signed a waiver of restrictions on assessment and collection of the resulting deficiency in tax. This note is properly deductible in 1949.

The third note is in the amount of \$84,568.49 and was issued February 15, 1950. The fourth note was in the amount of \$24,067.96 and was issued April 17, 1950. These two notes would be deductible in the year 1950.

The totals of the foregoing amounts of \$96,809.68 as deductible for the year 1949 and \$109,636.45 as deductible for the year 1950 are within the applicable limitations under the Code as per the attached recomputation. The amount of deficiency after allowing the foregoing deductions would be as per the attached deficiency recomputation and would result in a net deficiency for petitioner for the year ended 12/31/49 of \$24,522.81 and for the year ended 12/31/50 of \$1,233.22.

Petitioner requests the right of oral argument if the respondent disagrees with these recomputations.

Respectfully submitted,

/s/ A. R. KEHOE,
Attorney for Petitioner.

**AMOUNTS DEDUCTIBLE UNDER PRIMARY AND SECONDARY
LIMITATIONS PER RECOMPUTATION RULE 50**

Commissioner of Internal Revenue

15

	Year Ended 11/30/47	Year Ended 12/31/48	Year Ended 12/31/49	Year Ended 12/31/50
1. Amount of contribution				
(a) paid within fiscal year (cash).....	1,485.57	Nil	30,466.86	109,636.45
(b) paid within fiscal year (notes).....			66,342.82	
(c) less amount related to prior year.....				
(d) plus amount accrued from next year.....				
(e) total contributions for year.....	1,485.57	Nil	96,809.68	109,636.45
2. Primary limitation (15% of compensation).....	34,475.51	42,347.54	51,562.31	65,565.75
3. Secondary limitation				
(a) twice primary limitation.....			103,124.62	131,131.50
(b) total of all primary limitations (including current year)				
(c) total of all deductions for prior years.....			204,455.64	270,021.39
(d) excess of (b) over (c); (b) minus (c).....			35,345.41	134,155.09
(e) true limitation (lesser of (a) or (d)).....			169,110.23	135,866.30
4. Amount deductible			103,124.62	131,131.50
(a) on account of contributions in year.....	1,485.57	Nil	96,809.68	109,636.45
(b) on account of contributions carried over.....				
(c) Total	1,485.57	Nil	96,809.68	109,636.45

Note: The primary limitation of 15% of covered compensation for years prior to 1947 was:

1944	
1945	\$19,785.30
1946	\$22,461.45

A contribution deduction of \$33,859.84 was allowed for the year ended 11-30-44 and a contribution deduction of \$1,485.57 was allowed for the year ended 11-30-46. The latter is listed herein for the year ended 11-30-47 since the record (Tr. 67) shows it was paid Sept. 5, 1947. This makes no difference in the ultimate carryover computations.

RECOMPUTATION OF 1949 AND 1950 INCOME TAX PER RULE 50 UNDER THE 9TH CIRCUIT COURT DECISION

1949

Original Net Income per return.....	\$ 407,519.62
Audit revisions—Income increased.....	164,942.40
Agreed revisions	(4,750.00)
Trust Fund deductions	(96,809.68)
<hr/>	
Net taxable income—revised.....	470,902.34
Deduct capital gains.....	32,668.50
Normal tax income.....	438,233.84
Applicable rate—38%	
<hr/>	
Normal and Surtax.....	166,538.86
Capital Gains Tax.....	8,167.13
<hr/>	
Revised tax liability	174,705.99
Amount paid	—150,183.18
<hr/>	
Net Deficiency (overassessment).....	24,522.81

1950

Original net income per return.....	294,645.42
Audit revisions—income increased	
Original audit	119,157.25
Agreed revisions	(6,584.58)
Trust fund deductions.....	(109,636.45)
<hr/>	
Net taxable income.....	297,581.64
Deduct—dividend received credit.....	(16,380.35)
Deduct—capital gains	(48,578.54)
Normal tax income.....	232,622.75
Applicable rate 42%—\$4,750.00	
<hr/>	
Normal and Surtax.....	92,951.56
Capital gains tax.....	12,144.64
<hr/>	
Revised tax liability.....	105,096.20
Amount paid	—103,862.98
<hr/>	
Net deficiency (overassessment).....	1,233.22

Served March 3, 1959.

[Endorsed]: T.C.U.S. Filed March 2, 1959.

[Title of Tax Court and Cause.]

PETITIONER'S OBJECTIONS TO RESPOND-
ENT'S COMPUTATION FOR ENTRY OF
DECISION

Petitioner's recomputation for entry of decision pursuant to the remand of the Court of Appeals for the Ninth Circuit would result in a deficiency for 1949 of \$24,522.81 and a deficiency for 1950 of \$1,233.22. Respondent's recomputation would result in a deficiency for 1949 of \$32,588.60 and a deficiency for 1950 of \$22,889.39. There is no difference between the parties except as to the year in which \$72,814.40 of contributions to the trust would be deductible.

The Court of Appeals' ultimate decision was:

"After taking the view of the law hereinabove indicated, this court must now come to the question of the year of deductibility of the employer's payments. The Third Circuit has taken the view that taxpayer on an accrual basis is entitled to deduct promissory notes as a contribution in the year issued. *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313. This court fully agrees with the case of *Anthony P. Miller, Inc.*, 3 Cir. 164 F. 2d 268, (on its facts) upon which the Court of Appeals for the Third Circuit relies in *Sachs and Slaymaker*. Under Section 23(p)(1) E of the 1939 Code a taxpayer 'on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year.' The *Sachs-Slaymaker* decision

is a reasonable, but not a required extension of the Miller case. The point is a close one. In such circumstances it seems unnecessary to set up a conflict between circuits. Therefore, it is held that delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. This would determine the year of deductibility.

“In the background of this case is the question of amounts allowable as deductions under permissible limits of the statute. It would appear that under the principles laid down the allowable deductions can be readily calculated by the tax court for the years in which the note obligations were discharged. (Underscoring ours.)

The respondent charges the \$30,466.86 note that was dated January 10, 1948, but issued in May of 1948, and \$42,347.54 of the \$66,342.82 note that was dated and issued February 28, 1949, to the 1948 year even though that would throw the deduction into a barred year and would deny petitioner any benefit from the deduction and this despite the fact that respondent denied petitioner any deduction for these amounts in the years 1947 and 1948 in the first place. Respondent's only possible authority for such inequity is that it construes the Court of Appeals' ultimate decision quoted above to mean that the note issued in May of 1948 has to be charged to that year and \$42,347.54 of the \$66,342.82 note issued February 28, 1949, has to be charged to that same 1948 year because the note was a contribution for the year 1948 and constituted payment on the last day of that year because it was issued within 60 days of the close of that year.

The Court of Appeals was following the position of the Third Circuit in *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313, in holding that "delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date." Had it intended to relate the payment back to the last day of 1948 under Section 23 (p)(1)(E), providing that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," it would have said so. The Court of Appeals was aware of the fact that respondent had already denied petitioner a deduction for these amounts in 1947 and 1948 and that petitioner had filed a waiver and paid the resulting deficiency (Tr. 28 and 29). As a matter of fact, the Court of Appeals authorized the deduction of the \$30,466.86 note in 1949 when paid even though issued in 1948 when it concluded:

"It would appear that under the principles laid down, the allowable deductions can readily be calculated by the Tax Court for the years in which the note obligations were discharged."

In any event the respondent's position on the \$66,342.82 note issued in 1949 overlooks completely one important aspect of Section 23(p)(1)(E) that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," and that is that the election is permissive. The American Law Institute "Basic

Pension and Profit-Sharing Plans" (June, 1957), pages 16 and 17, point this out in stating:

"Even though the employer is on the accrual basis of accounting, the general rule is that contributions under a qualified plan are deductible only for the taxable year of the employer in which they are paid. However, since the largest proportion of employers are on the accrual basis, there is an exception to this general rule which is a tail that wags the dog. It is that an accrual basis employer may accrue a contribution as of the last day of the employer's taxable year and deduct the contribution, subject to the applicable limitations as to amount, if it is actually paid by the due date for filing the employer's income tax return for the taxable year. Before the 1954 Code, the accrued contribution had to be paid within sixty days after the end of the taxable year."

The Commissioner's own regulations construing Section 23(p)(1)(E) are consistent with the permissive nature of the deduction. Regulations III, Section 29.23(p)-1 in referring to Section 23(p)(1)(E) states:

"This latter provision is intended to permit a taxpayer on the accrual basis to deduct such accrued contribution or compensation, provided payment is actually made within sixty days after the close of the year of accrual."

It would be astounding indeed if respondent could here deny this petitioner a permissive deduction in 1948 and then after petitioner acquiesces in such

denial later force the deduction back to that year when any benefit is barred by the Statute of Limitations.

The Court of Appeals intended to give this trust the complete tax benefits it was entitled to as a qualified trust despite "the shortcomings of the errant taxpayer." It did not intend to give sixty per cent relief through the avaricious construction now advanced by the respondent.

Respectfully submitted,

/s/ A. R. KEHOE,
Attorney for Petitioner.

Served March 24, 1959.

[Endorsed]: T.C.U.S. Filed March 23, 1959.

Tax Court of the United States
Washington

Docket No. 50122

TIME OIL CO., Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit, dated Sep-

tember 4, 1958, and the order of this Court, dated March 2, 1959, the respondent filed a recomputation on February 27, 1959, and a memorandum brief on March 31, 1959, and the petitioner filed a recomputation on March 2, 1959, and objections to respondent's recomputation on March 23, 1959. This proceeding came on for hearing on April 1, 1959, at which time counsel for petitioner appeared. After having considered the recomputations and the briefs and the arguments of counsel, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1949 and 1950 in the amounts of \$32,588.60 and \$22,889.39, respectively.

[Seal] /s/ G. G. WITHEY,
Judge.

Entered: April 7, 1959.

Served April 8, 1959.

In The United States Court of Appeals
For The Ninth Circuit

Tax Court Docket No. 50122

TIME OIL CO., a Washington corporation,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

PETITION TO CORRECT THE DECISION OF
THE TAX COURT TO ACCORD WITH
THE MANDATE OF THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

To the Honorable Judges of the United States
Court of Appeals for the Ninth Circuit:

The petitioner on review, Time Oil Company, a corporation organized and existing by virtue of the laws of the State of Washington, by and through its attorney, A. R. Kehoe, petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court of the United States in this proceeding on the 7th day of April, 1959. This petition for review is filed pursuant to the provisions of Section 7481(3) of the Internal Revenue Code, as amended, to correct the decision of the Tax Court to accord with the mandate of the United States Court of Appeals for the Ninth Circuit dated September 4, 1958.

This proceeding concerns the decision of the Tax Court after remand by the Court of Appeals for the Ninth Circuit that petitioner had deficiencies in income tax for the taxable years 1949 and 1950 in the amounts of \$32,588.60 and \$22,889.39, respectively. The decision of the Tax Court was entered April 7, 1959, after respondent filed a recomputation pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit on February 27, 1959, and a Memorandum Brief on March 31, 1959, and the petitioner filed a recomputation on March 2, 1959, and Objections to Respondent's Recomputation on March 23, 1959, and after oral argument of both petitioner and respondent in Washington, D. C., on April 1, 1959.

Nature of Controversy

Petitioner's recomputation for entry of decision pursuant to the mandate of the Court of Appeals for the Ninth Circuit would result in a deficiency for 1949 of \$24,522.81, and a deficiency for 1950 of \$1,233.22. Respondent's recomputation and the Tax Court's decision which followed respondent's recomputation resulted in a deficiency for 1949 of \$32,588.60 and a deficiency for 1950 of \$22,889.39.

The Court of Appeals' ultimate decision was:

"After taking the view of the law hereinabove indicated, this court must now come to the question of the year of deductibility of the employer's payments. The Third Circuit has taken the view that taxpayer on an accrual basis is entitled to deduct promissory notes as a contribution in the year

issued. *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313. This court fully agrees with the case of *Anthony P. Miller, Inc.*, 3 Cir. 164 F. 2d 268, (on its facts) upon which the Court of Appeals for the Third Circuit relies in *Sachs and Slaymaker*. Under Section 23(p)(1) E of the 1939 Code a taxpayer 'on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year.' The *Sachs-Slaymaker* decision is a reasonable, but not a required extension of the *Miller* case. The point is a close one. In such circumstances it seems unnecessary to set up a conflict between circuits. Therefore, it is held that delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. This would determine the year of deductibility.

"In the background of this case is the question of amounts allowable as deductions under permissible limits of the statute. It would appear that under the principles laid down the allowable deductions can be readily calculated by the tax court for the years in which the note obligations were discharged." (Underscoring ours.)

There were four note contributions involved in this proceeding.

The first note was in the amount of \$30,466.86. While the note was dated January 10, 1948, and was issued presumably as a contribution for the year 1947, the record shows (Tr. 28) that it was not delivered to the trustees until May of 1948. The

record further shows that the respondent denied petitioner a deduction for the \$30,466.86 in the year 1947, and that petitioner signed a waiver of restrictions on assessment and collection of the resulting deficiency in tax (Tr. 28 and 29).

The second note is in the amount of \$66,342.82 and was issued February 28, 1949, presumably as a contribution for the year 1948. The record shows (Tr. 29) that the respondent disallowed this as a deduction for petitioner in 1948 and petitioner signed a waiver of restrictions on assessments and collection of the resulting deficiency in tax.

The third note is in the amount of \$84,568.49 and was issued February 15, 1950.

The fourth note was in the amount of \$25,067.96 and was issued April 17, 1950.

The only amounts in controversy in this petition to correct the decision of the Tax Court to accord with the mandate of the United States Court of Appeals are the \$30,466.86 represented by the note dated January 10, 1948, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949. The recomputation of the respondent and the Tax Court's decision would throw the deduction for the amounts of \$30,466.86 and \$42,347.54 into the year 1948, which is now a barred year, and this would deny petitioner any benefits from the deduction whatsoever despite the fact that respondent had previously denied petitioner any deduction for these amounts in the years 1947 and 1948 in the first place when taxpayer had so taken them.

One important consideration should be initially

noted. This case was remanded at respondent's insistence in footnote 12 of his brief to enable the Tax Court to determine the allowable deductions under the primary and secondary limitations of Section 23(p)(1)(C) of the Code and Regulations 111, Sec. 29.23(p)-10 relating thereto. There is no disagreement between the parties hereto that the full amounts of deductions as now asserted by petitioner would be allowable under the primary and secondary limitations of the Statute and Regulations referred to.

The position of the respondent and the Tax Court is premised on a construction of the Court of Appeals' ultimate decision to the effect that the note issued in May of 1948 in the amount of \$30,466.86 has to be charged to that year since it was issued in that year more than sixty days after the close of the year 1947, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949, has to be charged to that same 1948 year because the note was a contribution for the year 1948 and constituted payment on the last day of that year because it was issued within sixty days of the close of that year. The \$42,347.54 is the maximum respondent can allocate to the year 1948 under the limitation of 15% of the aggregate compensation of eligible employees for that year.

It is the position of the petitioner that the Court of Appeals in this case authorized the deduction for the \$66,342.82 in the year 1949 since the note was delivered in the year 1949.

The Court of Appeals was following the position

of the Third Circuit in *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313, in holding that "delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date." Had the Court of Appeals intended to relate the payment back to the last day of 1948 under Section 23(p)(1)(E) providing that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," it would have said so. It is petitioner's position that the Court of Appeals was aware of the fact that respondent had already denied petitioner a deduction for this amount in 1948 and that petitioner had filed a waiver and paid the resulting deficiency (Tr. 29).

In addition, the position of the Tax Court and the respondent on the \$66,342.82 note issued in 1949 completely overlooks one important aspect of Section 23(p)(1)(E) of the Code. While Section 23(p)(1)(E) provides that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," the accrual has been deemed to be permissive rather than mandatory. The Commissioner's own regulations established the permissive nature of the deduction. In Regulations 111, Section 29.23 (p)-1, referring to Section 23(p)(1)(E) of the Code, the Commissioner states:

“This latter provision is intended to permit a taxpayer on the accrual basis to deduct such accrued contribution or compensation provided payment is actually made within sixty days after the close of the year of accrual.”

It would appear to petitioner that it would be astounding indeed if respondent could here deny this petitioner a permissive deduction in 1948 and then, after petitioner acquiesces in such denial, later force the deduction back to that year when any benefit is barred by the statute of limitations.

It is petitioner's position that the Court of Appeals authorized the deduction of even the \$30,-466.86 note in 1949 when paid, even though issued in 1948, when it concluded:

“It would appear that under the principles laid down, the allowable deductions can readily be calculated by the Tax Court for the years in which the note obligations were discharged.”

The use of the word “discharged” would clearly indicate a deduction at the time of payment of the note if deduction had not been allowed at the time the note was issued.

It is petitioner's position that the Court of Appeals intended to give this trust the complete tax benefits it was entitled to as a qualified trust despite “the shortcomings of the errant taxpayer.” It did not intend to give 60% relief through the narrow construction advanced by the respondent and adopted by the Tax Court.

Petitioner, being aggrieved by the decision of the

Tax Court dated April 7, 1959, and believing that the decision did not follow the mandate of the Court of Appeals for the Ninth Circuit dated September 4, 1958, desires to obtain a review of the Tax Court's decision and a correction thereof to accord with the mandate of the decision of the United States Court of Appeals for the Ninth Circuit.

Wherefore, it petitions that a transcript of the hearing in the Tax Court on the entry of the decision pursuant to mandate of the United States Court of Appeals together with the respondent's recomputation filed February 27, 1959, and Memorandum Brief filed March 31, 1959, and Petitioner's recomputation filed March 2, 1959, and objections to respondent's recomputation filed on March 23, 1959, in the United States Tax Court, Docket No. 50122, be certified and transmitted to the Clerk of the United States Court of Appeals for the Ninth Circuit for filing and appropriate action to the end that the errors complained of may be reviewed and corrected by the United States Court of Appeals for the Ninth Circuit.

/s/ A. R. KEHOE.

Duly Verified.

[Endorsed]: T.C.U.S. Filed May 4, 1959.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION TO CORRECT
THE DECISION OF THE TAX COURT

To: Arch M. Cantrall, Chief Counsel, Internal Revenue Service, Internal Revenue Building, Washington, D. C.

You are hereby notified that the above petitioner has filed with the Clerk of the United States Tax Court at Washington, D. C., a Petition to Correct the Decision of the Tax Court to Accord with the Mandate of the United States Court of Appeals for the Ninth Circuit. A copy of said petition as filed is hereto attached and served upon you.

Dated this 1st day of May, 1959.

/s/ A. R. KEHOE,
Counsel for Petitioner.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. Filed May 5, 1959.

[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on review and docketing the petition for review in the United States Court of Appeals for the Ninth Circuit is extended to August 2, 1959.

Dated: Washington, D. C., May 26, 1959.

/s/ J. E. MURDOCK,
Judge.

Served May 26, 1959.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 10, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review" (excepting item 5 of the designation which is not of record) in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States at Washington, in the District of Columbia, this 17th day of June, 1959.

[Seal]

HOWARD P. LOCKE,
Clerk of the Court,

/s/ By GERTRUDE W. COLL,
Deputy Clerk.

[Endorsed]: No. 16534. United States Court of Appeals for the Ninth Circuit. Time Oil Co., a corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: June 30, 1959.

Docketed: July 9, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 16534

TIME OIL CO., a Washington Corporation,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS ON PETITION TO
CORRECT THE DECISION OF THE TAX
COURT TO ACCORD WITH THE MAN-
DATE OF THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

Petitioner hereby designates the following State-
ment of Points on which it intends to rely in its ap-

peal from the decision of the United States Tax Court made and entered April 7, 1959, in Tax Court Docket No. 50122 after Remand from the United States Court of Appeals for the Ninth Circuit.

I.

This proceeding concerns the decision of the Tax Court after remand by the Court of Appeals for the Ninth Circuit that petitioner had deficiencies in income tax for the taxable years 1949 and 1950 in the amounts of \$32,588.60 and \$22,889.39, respectively. The decision of the Tax Court was entered April 7, 1959, after respondent filed a recomputation pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit on February 27, 1959, and a Memorandum Brief on March 31, 1959, and the petitioner filed a recomputation on March 2, 1959, and Objections to Respondent's Recomputation on March 23, 1959, and after oral argument of both petitioner and respondent in Washington, D. C., on April 1, 1959. The Tax Court Decision determined that Respondent's Recomputation was correct. Petitioner's recomputation would result in a deficiency for 1949 of \$24,522.81, and a deficiency for 1950 of \$1,233.22.

II.

The Court of Appeals' ultimate decision was:

"After taking the view of the law hereinabove indicated, this Court must now come to the question of the year of deductibility of the employer's payments. The Third Circuit has taken the view that

taxpayer on an accrual basis is entitled to deduct promissory notes as a contribution in the year issued. *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313. This Court fully agrees with the case of *Anthony P. Miller, Inc.*, 3 Cir. 164 F. 2d 268, (on its facts) upon which the Court of Appeals for the Third Circuit relies in *Sachs and Slaymaker*. Under Section 23(p)(1) E of the 1939 Code a taxpayer 'on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year.' The *Sachs-Slaymaker* decision is a reasonable, but not a required extension of the *Miller* case. The point is a close one. In such circumstances it seems unnecessary to set up a conflict between circuits. Therefore, it is held that delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. This would determine the year of deductibility.

"In the background of this case is the question of amounts allowable as deductions under permissible limits of the statute. It would appear that under the principles laid down the allowable deductions can be readily calculated by the tax court for the years in which the note obligations were discharged." (Underscoring ours.)

III.

There were four note contributions involved in this proceeding. The first note was in the amount of \$30,466.86. While the note was dated January 10,

1948, and was issued presumably as a contribution for the year 1947, the record shows (Tr. 28) that it was not delivered to the trustees until May of 1948. The record further shows that the respondent denied petitioner a deduction for the \$30,466.86 in the year 1947, and that petitioner signed a waiver of restrictions on assessment and collection of the resulting deficiency in tax (Tr. 28 and 29).

The second note is in the amount of \$66,342.82 and was issued February 28, 1949, presumably as a contribution for the year 1948. The record shows (Tr. 29) that the respondent disallowed this as a deduction for petitioner in 1948 and petitioner signed a waiver of restrictions on assessments and collection of the resulting deficiency in tax.

The third note is in the amount of \$84,568.49 and was issued February 15, 1950.

The fourth note was in the amount of \$25,067.96 and was issued April 17, 1950.

IV.

The only amounts remaining in controversy are the \$30,466.86 represented by the note dated January 10, 1948, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949. The Tax Court's decision places the deduction for the amounts of \$30,466.86 and \$42,347.54 into the year 1948, which is now a barred year.

The position of the respondent and the Tax Court is premised on a construction of the Court of Appeals' ultimate decision to the effect that the note issued in May of 1948 in the amount of \$30,466.86

has to be charged to that year since it was issued in that year more than sixty days after the close of the year 1947, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949, has to be charged to that same 1948 year because the note was a contribution for the year 1948 and constituted payment on the last day of that year because it was issued within sixty days of the close of that year. The \$42,347.54 is the maximum respondent can allocate to the year 1948 under the limitation of 15% of the aggregate compensation of eligible employees for that year.

It is the position of the petitioner that the Tax Court was in error and that the Court of Appeals in this case authorized the deduction for the \$66,342.82 in the year 1949 since the note was delivered in the year 1949.

The Court of Appeals was following the position of the Third Circuit in *Sachs and Slaymaker v. Commissioner*, 208 F. 2d 313, in holding that "delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. Had the Court of Appeals intended to relate the payment back to the last day of 1948 under Section 23(p)(1)(E) providing that a taxpayer "on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year," it would have said so. It is petitioner's position that the Court of Appeals was aware of the fact that respondent had already denied petitioner a deduction for this amount in 1948 and that peti-

tioner had filed a waiver and paid the resulting deficiency (Tr. 29).

It is petitioner's position that the Tax Court was in error on the \$30,466.86 note and that the Court of Appeals authorized the deduction of even that note in 1949 when paid, even though issued in 1948, when it concluded:

"It would appear that under the principles laid down, the allowable deductions can readily be calculated by the Tax Court for the years in which the note obligations were discharged." The use of the word "discharged" would clearly indicate a deduction at the time of payment of the note if deduction had not been allowed at the time the note was issued.

/s/ A. R. KEHOE,
Counsel for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 23, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by the parties in this proceeding that if it is necessary for ultimate decision the Court may refer to and have access to the original briefs and transcript in this proceeding in addition to the transcript and briefs filed on this petition.

/s/ A. R. KEHOE,
Counsel for Petitioner.

/s/ HOWARD A. HEFFRON,
Acting Assistant Attorney General, Tax Division,
United States Department of Justice, Wash-
ington 25, D. C., Counsel for Respondent.

[Endorsed]: Filed July 23, 1959. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF THE CON- TENTS OF THE RECORD TO BE PRINTED

To The Clerk of The Above Entitled Court:

Appellant designates the following portions of
the record to be printed:

Tax Court Docket No. 50122:

1. Docket Entries.
2. Respondent's computation for the entry of
decision filed February 27, 1959.

3. Petitioner's computation for the entry of decision filed March 2, 1959.

4. Petitioner's objections to respondent's computation filed March 23, 1959.

5. Minutes of Proceeding before Tax Court on Petition to correct the Decision of the Tax Court to accord with the mandate of the United States Court of Appeals for the Ninth Circuit.

6. Decision of the Tax Court on remand dated April 7, 1959.

7. Petition for Review.

8. Proof of Service.

9. Designation of Contents of Record.

10. Order Enlarging Time.

United States Court of Appeals for the Ninth Circuit No. 16534:

11. Appellant's Designation of the Contents of the Record to be printed.

12. Statement of Points on Petition to Correct the Decision of the Tax Court to accord with the mandate of the United States Court of Appeals for the Ninth Circuit.

13. Stipulation on original transcript and briefs.

/s/ A. R. KEHOE,
Counsel for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 23, 1959. Paul P. O'Brien, Clerk.

**In the United States Court of Appeals
for the Ninth Circuit**

TIME OIL Co., a corporation, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
MELVA M. GRANAY,
HELEN A. BUCKLEY,
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Department of Justice,
Washington 25, D. C.*

FILED

DEC 9 1959

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16534

TIME OIL Co., a corporation, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

PREVIOUS OPINIONS

The Tax Court's former opinion in this case is reported at 26 T.C. 1061. Upon review, this Court remanded, 258 F. 2d 237. The decision of the Tax Court on the remand (R. 21-22) is not officially reported.

JURISDICTION

This case concerns federal income taxes for the years 1949 and 1950 and was previously before this Court (Docket No. 15444), which remanded it to the Tax Court for further proceedings (258 F.2d

237). The decision of the Tax Court on the remand was entered on April 7, 1959. (R. 21-22.) The case is brought again to this Court by a petition for review filed May 4, 1959. (R. 23-30.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the Tax Court erred in holding on the remand from this Court that contributions made to a stock bonus and profit sharing trust by promissory note within sixty days after the close of a taxable year by an accrual basis taxpayer must be deducted in the taxable year.

STATUTE AND OTHER AUTHORITIES INVOLVED

The pertinent portions are set forth in the Appendix, *infra*.

STATEMENT

This case is now before this Court for the second time. It was originally the position of the Commissioner in the Tax Court that the Time Oil Company, the taxpayer herein, was not entitled to deductions in 1949 and 1950 for contributions to a stock bonus and profit sharing trust for its employees on the ground that the trust was not tax exempt because of various discrepancies between the plan as submitted to the Commissioner and its actual operation. Upon review, this Court held that since the trust plan had previously been approved by the Commissioner and since the variations between the approved plan and the actual operation of it were *de minimus*, the trust

was tax exempt for the years in question and the taxpayer accordingly was entitled to deduct under the provisions of Section 23(p) of the Internal Revenue Code of 1939 the amounts contributed thereto. In addition, the Commissioner contended that where the taxpayer made its contributions to the stock bonus and profit sharing trust by the issuance of negotiable notes, such contributions might not be deducted until the year in which the note was discharged. This Court held to the contrary (258 F. 2d 237, 240), stating that "delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date. This would determine the year of deductibility." The case was thereupon remanded to the Tax Court for a determination of the "amounts allowable as deductions under permissible limits of the statute."

The taxpayer was on an accrual basis. (No. 15444, R. 25-26.) There are four separate notes involved in this case. Information concerning these notes is tabulated below:

NOTES ISSUED

	\$30,466.86	\$66,342.82	\$84,568.49	\$25,067.9
Contribution for year ended (No. 15444, R. 67)	1947	1948	1949	194
Date of delivery to trustee (No. 15444, R. 67)	May, 1948	2-28-49	2-15-50	4-17-50
Date of discharge of note (No. 15444, R. 67)	4-20-49	8-8-50	8-8-50 ²	?
Year in which taxpayer claims deduction (Br. 5; R. 13-16)	1949	1949	1950	1950
Year of deduction as computed by Commissioner (R. 11)	1948	1948-1949 ¹	1949-1950 ³	1950

The Tax Court entered judgment in accord with the Commissioner's computations (R. 21-22) and from such decision the taxpayer here petitions for review (R. 23-30).

SUMMARY OF ARGUMENT

On the remand, this case involves no more than the question of the year of deductibility of contributions to a profit-sharing trust. This Court has held that such contributions were "paid" when the tax-

¹ The Commissioner computed that \$42,347.54 was deductible in 1948 and that the balance, \$23,995.28, could be carried over as a deduction in 1949. (R. 11.)

² A partial discharge only, in the amount of \$21,926.45, was made of this note. (No. 15444, R. 67.)

³ The Commissioner computed that \$51,562.31 was deductible in 1949 and that \$33,006.18 could be carried over as a deduction in 1950. (R. 11.)

payer delivered its promissory notes. The computations of the Commissioner on the remand, which were accepted by the Tax Court for entry of judgment, were based upon two premises. The first was that where a note was issued by an accrual basis taxpayer within sixty days after the close of a taxable year, the note must be deducted during the taxable year under the mandatory language of Section 23(p)(1)(E) of the 1939 Code. The second premise is that the only relevant date for determination of deductibility is the date of *delivery* of the note. The language of this Court in its opinion on the earlier appeal in this case, in which it was stated that the deductions can be calculated for the years in which the notes were "discharged", appears to be inadvertent and probably resulted from a clerical error. From the language immediately preceding the statement in question it is clear that the Court meant to say "delivered"; indeed to hold otherwise would set up a conflict with the Third Circuit, which this Court expressly refused to do. The decision of the Tax Court is correct and should be affirmed.

ARGUMENT

Where Contributions Are Made To A Stock Bonus and Profit-Sharing Trust By Promissory Note Within Sixty Days After the Close of A Taxable Year By An Accrual Basis Taxpayer, the Contributions Must Be Deducted in the Taxable Year

The taxpayer herein made various contributions to a stock bonus and profit-sharing trust which it had set up for its employees. This Court held that the trust was tax exempt under Section 165 of the In-

ternal Revenue Code of 1939, and that the taxpayer's contributions thereto were deductible under Section 23(p)(1)(C), Appendix, *infra*. It also held that the issuance of promissory notes to the trustee constituted payment within the statutory language, whereas the Commissioner had contended that there was no payment until the taxpayer discharged the promissory notes. 258 F. 2d 237. The present aspect of this case concerns the year in which deduction for the various payments by promissory note may be taken, the taxpayer objecting to the Tax Court decision upon the remand which accepted the Commissioner's computations as a basis for entry of decision.

Contributions to stock bonus and profit-sharing plans are deductible when paid to the extent of fifteen percent of the compensation otherwise paid or accrued during the taxable years to all employees under the stock bonus or profit-sharing plan (Section 23(p)(1)(C)), except that Section 23(p)(1)(E), Appendix, *infra*, provides that—

(E) For the purposes of subparagraphs (A), (B), and (C), a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year, and is made within sixty days after the close of the taxable year of accrual.

In addition, the statutory scheme provides that if there is paid an amount less than the fifteen percent limitation, the taxpayer shall have a credit for the difference which may be carried forward and de-

ducted in succeeding taxable years, subject again to the fifteen percent limitation in the succeeding year; likewise, if there is paid an amount in excess of fifteen percent, the excess amount contributed may likewise be deducted in succeeding taxable years, with the fifteen percent limitation. Section 23(p)(1)(C). The fifteen percent limitation is not in controversy in this case, the only question being the basic year of deductibility of each note.

The Commissioner's computations were based upon two premises. The first is that, where a note was issued within sixty days after the close of a taxable year, the note must be deducted in the taxable year to the extent allowed under the fifteen percent limitation. This is so because the language of Section 23(p)(1)(E) in mandatory terms provides that "a taxpayer on the accrual basis *shall* be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year, and is made within sixty days after the close of the taxable year of accrual." (*Italics supplied.*) The statute does not provide that an accrual basis taxpayer may or may not, as it wishes, make a choice as to the year of deductibility, as the taxpayer here contends. There is nothing whatsoever permissive about the terms of the section. As a general rule, a liability must be accrued for tax purposes when an unconditional obligation to pay arises. This general rule is then somewhat restricted by the specific provisions of the Code relating to stock bonus, pension, profit-sharing or annuity plans, wherein only contributions "paid" rather than those paid or accrued

are to be deductible. To some extent it was the intent of Congress to place all taxpayers on an equal footing, regardless of whether they report income on the accrual basis or the cash basis of accounting. See H. Rep. No. 2087, 80th Cong., 2d Sess., p. 13, on Revenue Revision Act of 1948. However, it was not intended to remove completely all accruals under Section 23(p) of the Code by an accrual basis taxpayer. For that reason, Section 23(p)(1)(E) was enacted to retain the accrual system of reporting to a limited extent. Thus, the liability for contributions to a profit-sharing plan must be accrued if there was an unconditional liability to pay and if actual payment was made within sixty days of the close of the taxable year. See also 4 Mertens, Law of Federal Income Taxation, Secs. 25B.28 and 25B.29; Rev. Rul. 56-366, 1956-2 Cum. Bull. 976, Appendix, *infra*; Rev. Rul. 57-378, 1957-2 Cum. Bull. 268, Appendix, *infra*.

The second premise upon which the Commissioner's computations were based is that the only relevant date in this case for determination of the basic year of deductibility is the date of *delivery* of the note under the decision of this Court. In adopting the view of the Third Circuit in *Sachs v. Commissioner*, 208 F. 2d 313, this Court, although recognizing that the point was "a close one", specifically held (258 F. 2d 237, 240) that "delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date".

The Commissioner has therefore made his computations on the theory that the basic year of deducti-

bility of any of the notes involved may be determined only by applying the above two tests. Thus, taking each note in turn, it can readily be seen that the Commissioner has followed a consistent and logical method of determining the year of deductibility which is squarely in accord with the language which this Court used in remanding the matter to the Tax Court. On the other hand, the taxpayer has vacillated from one theory to another depending upon the particular tax consequences befalling it as to the deductible year of any given note. This is readily apparent when the contentions as to the deductibility of each note are reviewed seriatim.⁴

The first note in issue, that for \$30,466.86, was issued in May of 1948. Since this Court has held that issuance constitutes payment in this case, it is our position that under the remand the note was be deducted in 1948. The taxpayer, on the other hand, argues that it should be allowed to deduct the note in 1949, when it was discharged, rather than in 1948, when it was issued. Its reasoning in this respect, while interesting, is not persuasive. Apparently, the taxpayer bases its argument as to this note upon the fact that the Commissioner originally denied taxpayer a deduction of the \$30,466.86 for

⁴ The taxpayer's arguments as to this question are completely inconsistent. Thus, it argues that the first note should be deducted in 1949, the year of discharge; the second note in 1949, during the first sixty days of which year the note was issued; the third note in 1950, where the note was issued in February of that year and paid in August; the fourth note in 1950, during April of which the note was issued.

the year 1947, and that taxpayer thereafter signed a "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax" ⁵ for that year. (Br. 3-4; No. 15444, R. 28-29.) Just why this action upon the part of the Commissioner and the taxpayer should now give taxpayer the right to the deduction in 1949 is nowhere explained. Under no theory advanced in this case would this amount be deductible in 1947. The note was not issued until May of 1948 and was not paid until April of 1949. (No. 15444, R. 67.) It should be pointed out that the Commissioner consistently argued before the Tax Court and this Court that the notes should not be deductible until they were actually paid; it was the taxpayer itself which first brought up this issue by its argument that the notes should be deductible when issued.⁶ Now, having convinced this Court to refrain from a conflict with the Third Circuit in this respect and to hold that issuance of the note is payment, the taxpayer has apparently changed its mind. But on the re-

⁵ The taxpayer argues that because it has signed a waiver for 1947 and 1948 taxes the Commissioner should be estopped from denying it the deduction for 1949. (Br. 8-10.) Even if it should be true that 1948 is a barred year, as taxpayer now contends, it is still not entitled to the deductions it seeks for the years before this Court. We would suggest that taxpayer's remedy, if indeed it has any, must lie within the provisions of Sections 1311 through 1315 of the 1954 Code, which in some situations mitigate the effect of the statute of limitations.

⁶ Obviously, if taxpayer had not brought up the point the question would never have been at issue since the Commissioner has always contended that the issuance of the notes did not constitute payment.

mand the Tax Court was bound to follow this Court's decision. Accordingly, the Tax Court correctly held that the \$30,466.86 note is deductible only in 1948, when it was issued.

The inconsistent position now adopted by the taxpayer evidently stems from the next to the last paragraph of this Court's opinion. (Br. 7-8.) This Court stated that—

It would appear that under the principles laid down the allowable deductions can be readily calculated by the tax court for the years in which the note obligations were *discharged*. (Italics supplied.)

A reading of the entire opinion makes it clear that most likely the use of the word "discharged" by this Court was inadvertent and probably the result of a clerical error. From the language immediately preceding this sentence we believe that there is no doubt but that the Court meant "delivered". Indeed, the language preceding the above-quoted language makes it clear that the law of this case is that notes are deductible when issued. To hold otherwise would set up a conflict between this Court and the Third Circuit in the *Sachs* case and this Court expressly stated that it would not set up such a conflict. The note for \$30,466.86 must be deducted in the year in which it was delivered, 1948, rather than the year in which it was discharged, 1949, under the mandate of this Court.

The next note to be considered is that for \$66,-342.82. This note was delivered to the trustee on February 28, 1949. It was paid on August 8, 1950.

(No. 15444, R. 67.) The taxpayer claims that this note also should be deducted in the year 1949. (Br. 5.) It is our position, however, that since this note was delivered by an accrual basis taxpayer less than sixty days from the end of the taxable year (1948) to which it related, Section 23(p)(1)(E) requires that it be deducted in the taxable year, 1948. Since, however, the total allowable deductions in 1948 exceeded the fifteen percent limitation set up by the statute, the difference has been carried over into 1949 in the computations. Thus, \$23,995.28 of the total amount of this note is deductible in 1949. The taxpayer places in issue only the fact that the Commissioner has not allowed the entire amount to be deducted in 1949. (Br. 4.)

Under the argument of the taxpayer regarding the deductibility of the note for \$30,466.86, great reliance is placed upon what we feel to be the inadvertent statement of this Court that the deductions could be taken in the year in which the notes were discharged. In regard to the \$66,342.82 note issued for the succeeding year's contributions, however, the taxpayer makes a new, inconsistent, and completely different argument. Here, rather than placing reliance upon the use of the word "discharged" and arguing that the note should be deducted in 1950 when it was discharged, taxpayer argues that it should be deducted in 1949 since it was actually issued during that calendar year. To reach this conclusion, once again the taxpayer would have this Court completely ignore the mandatory language of Section 23(p)(1)(E) that such payment within

sixty days of the taxable year "shall" be deemed to have been made during the taxable year, which in this case was 1948.

As to the remaining two notes involved in this case, the taxpayer apparently is in agreement with the computation of the Commissioner. In any event it limits this appeal to the first two notes. However, for the information of this Court, the note for \$84,-568.49 was issued in February of 1950 and partially discharged in August of 1950. (No. 15444, R. 67.) The Commissioner, following the mandatory language of Section 23(p)(1)(E), considered the basic year of deductibility of this note as 1949. Here, too, there was some carry over into 1950 because of the fifteen percent limitation. (R. 11.) The last note, that for \$25,067.96, was issued on April 17, 1950. (No. 15444, R. 67.) The record apparently does not show its date of discharge. Under the Commissioner's computations this note was deductible in 1950. (R. 11.) Thus once again the taxpayer's position is inconsistent with that advanced in its brief. Indeed, a fair statement as to the taxpayer's choice of a year of deductibility of each note is that it desires the note deducted in whichever year it can receive the best tax advantage. This position the taxpayer maintains despite the clear command of the statute and despite the principles set forth by this Court in remanding the case.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
MELVA M. GRANAY,
HELEN A. BUCKLEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

DECEMBER, 1959.

APPENDIX

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(p) [As amended by Sec. 162(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred-Payment Plan.*—

(1) *General rule.*—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under subsection (a) but shall be deductible, if deductible under subsection (a) without regard to this subsection, under this subsection but only to the following extent:

* * * *

(C) In the taxable year when paid, if the contributions are paid into a stock bonus or profit-sharing trust, and if such taxable year ends within or with a taxable year of the trust with respect to which the trust is exempt under section 165(a), in an amount not in excess of 15 per centum of the compensation otherwise paid or accrued during the taxable year to all

employees under the stock bonus or profit-sharing plan. If in any taxable year beginning after December 31, 1941, there is paid into the trust, or a similar trust then in effect, amounts less than the amounts deductible under the preceding sentence, the excess, or if no amount is paid, the amounts deductible, shall be carried forward and be deductible when paid in the succeeding taxable years in order of time, but the amount so deductible under this sentence in any such succeeding taxable year shall not exceed 15 per centum of the compensation otherwise paid or accrued during such succeeding taxable year to the beneficiaries under the plan. In addition, any amount paid into the trust in a taxable year beginning after December 31, 1941, in excess of the amount allowable with respect to such year under the preceding provisions of this subparagraph shall be deductible in the succeeding taxable years in order of time, but the amount so deductible under this sentence in any one such succeeding taxable year together with the amount allowable under the first sentence of this subparagraph shall not exceed 15 per centum of the compensation otherwise paid or accrued during such taxable year to the beneficiaries under the plan. The term "stock bonus or profit-sharing trust", as used in this subparagraph, shall not include any trust designed to provide benefits upon retirement and covering

a period of years, if under the plan the amounts to be contributed by the employer can be determined actuarially as provided in subparagraph (A). If the contributions are made to two or more stock bonus or profit-sharing trusts, such trusts shall be considered a single trust for the purposes of applying the limitations in this subparagraph.

* * * *

(E) For the purposes of subparagraphs (A), (B), and (C), a taxpayer on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year of accrual.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(p)-1. *Contributions of an Employer to an Employees' Trust or Annuity Plan and Compensation Under a Deferred Payment Plan—In General.*— * * *

* * * *

Deductions under section 23(p) are generally allowable only for the year for which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his return on the accrual basis. Exceptions are made in the case of overpayments as provided in subparagraphs (A), (C), and (F) of section 23

(p)(1), and, as provided by section 23(p)(1)(E), in the case of payments made by a taxpayer on the accrual basis within 60 days after the close of the taxable year of accrual. This latter provision is intended to permit a taxpayer on the accrual basis to deduct such accrued contribution or compensation, provided payment is actually made within 60 days after the close of the year of accrual.

* * * *

SEC. 29.23(p)-10 [As amended by T.D. 5666, 1948-2 Cum. Bull. 34]. *Contributions of an Employer to an Employees' Profit-Sharing or Stock Bonus Trust That Meets the Requirements of Section 165(a)—Application of Section 23(p)(1)(C).*— * * *

The amount of deductions under section 23(p)(1)(C) for any taxable year is subject to limitations based on the compensation otherwise paid or accrued during such taxable year to the employees who, in such year, are beneficiaries of the trust funds accumulated under the plan. For this purpose "compensation otherwise paid or accrued" means all of the compensation paid or accrued except that for which a deduction is allowable under a plan that qualifies under section 165(a), including a plan that qualifies under section 23(p)(1)(B). The limitations under section 23(p)(1)(C) apply to the total amount deductible for contributions to the trust regardless of how the funds of the trust are invested, applied, or distributed, and no other deduction is allowable on account of any benefits provided by contributions to the trust or by the funds thereof. Where contributions are paid to two or more profit-sharing or stock

bonus trusts satisfying the conditions for deduction under section 23(p)(1)(C), such trusts are considered as a single trust in applying these limitations.

The primary limitation on deductions for a taxable year is 15 percent of the compensation otherwise paid or accrued during such taxable year to the employees who, in such year, are beneficiaries of the trust funds accumulated under the plan. So long as the contributions do not in any year exceed the primary limitation, this is the only limitation under section 23(p)(1)(C) which has any effect.

In order that the deductions may average 15 percent of compensation otherwise paid or accrued over a period of years where contributions in some taxable year beginning after December 31, 1941, are less than the primary limitation but contributions in some succeeding taxable year exceed the primary limitation, deductions in each succeeding year are subject to a secondary limitation instead of to the primary limitation. The secondary limitation for any year is equal to the lesser of (a) twice the primary limitation for the year, or (b) any excess of (1) the aggregate of the primary limitations for the year and for all prior years beginning after December 31, 1941, over (2) the aggregate of the deductions allowed or allowable under the limitations provided in section 23(p)(1)(C) for all prior years beginning after December 31, 1941, after giving effect to the provisions of section 162(d)(1)(C) of the Revenue Act of 1942 in computing both items (1) and (2).

In any case where the contributions in a taxable year beginning after December 31, 1941,

exceed the amount allowable as a deduction for the year under section 23(p)(1)(C) after giving effect to section 162(d)(1)(C) of the Revenue Act of 1942, the excess is deductible in succeeding taxable years, in order of time, in which the contributions are less than the primary limitations, so that the total deduction for any such succeeding year is equal to the primary limitation for such year but not more than the sum of the contributions in such year and the excess contributions not deducted under the limitations of section 23(p)(1)(C) for prior years beginning after December 31, 1941.

* * * *

Rev. Rul. 56-366, 1956-2 Cum. Bull. 976:

REGULATIONS 118, SECTION 39.23(p)-10: Contributions of an employer to an employees' profit-sharing or stock bonus trust that meets the requirements of section 165(a).

(Also Regulations 111, Section 29.23(p)-10.)

An employees' profit-sharing or stock bonus plan which is intended to qualify under section 165(a) of the Internal Revenue Code of 1939 is not required to contain a definite predetermined formula for determining the profits to be shared as a condition for qualification. If a plan contains such a formula, however, contributions in excess of the formula commitment must be made pursuant to a legal obligation incurred prior to the close of the taxable year under consideration.

I. T. 4055, C. B. 1951-2, 30, modified.

Advice has been requested whether it is permissible to ignore a definite predetermined formula for determining the profits to be shared, presently contained in an existing employees' profit-sharing or stock bonus plan which is qualified under section 165(a) of the Internal Revenue Code of 1939, and make contributions in any amounts desired and obtain deductions therefor within the applicable limits, in view of the definition of a profit-sharing plan set forth in section 39.165-1(a)(2) of Regulations 118 and section 29.165-1(a) of Regulations 111, both as last amended by T. D. 6189, page 972 of this Bulletin, approved July 2, 1956, which omits the requirement for such a definite predetermined formula, contained in the regulations prior to the last amendment.

Deductions under section 23(p) of the Code are generally allowable only in the taxable year in which the contribution or compensation is paid, regardless of the fact that the taxpayer may make his return on the accrual basis, except that overpayments may be carried forward as provided for in subparagraphs (A), (C), and (F) of section 23(p)(1) of the Code, and, as provided by section 23(p)(1)(E) of the Code, a taxpayer on the accrual basis may make payment within 60 days after the close of the taxable year of accrual. The provision for payment after the close of the taxable year of accrual, however, is not applicable unless, during the taxable year on account of which the contribution is made, the taxpayer incurs a liability to make the contribution, the amount of which is accruable under section 43 of the Code for such taxable year.

Accordingly, the contribution must either be made during the taxable year under consideration, or, in the case of a taxpayer on the accrual basis who makes a contribution within 60 days after the close of the taxable year of accrual, the taxpayer must incur a liability to make the contribution, the amount of which is accruable under section 43 of the Code for such taxable year. If the plan is amended prior to the close of the taxable year, such liability will be incurred in accordance with the amendment. The amendment need not be executed with any degree of formality but, as prescribed by section 39.165-1 (a) (1) of Regulations 118, it must conform to the following requisites:

1. It must be in writing. In this respect, it must be signed by persons competent to bind the parties before the close of the taxable year under consideration.
2. It must be definite so as to constitute part of the definite written program and arrangement which is the plan.
3. It must be communicated to the employees. This must be done before the contribution is made and before the close of the taxable year under consideration.
4. It must be part of the plan which has been established and is maintained by the employer.

I. T. 4055, C. B. 1951-3, 30, holds that deductions for contributions to an employees' qualified profit-sharing trust are allowable under the conditions and within the limitations of section 23(p) (1) (C) of the Code only to the extent required by the terms of the plan of which the

trust is a part, and that payments in excess of the required amounts are not available as carryovers and are not deductible in a subsequent year. To the extent that I. T. 4055 limits the allowable deduction for contributions by a predetermined formula for determining profits to be shared, it is hereby modified.

Rev. Rul. 57-378, 1957-2 Cum. Bull. 268:

26 CFR 1.404(a)-9: Contributions of an employer to an employees' profit-sharing or stock bonus trust that meets the requirements of section 401(a); application of section 404(a)(3)(A).

When an employer's commitment under a qualified employees' profit-sharing plan, for a particular taxable year, is made subsequent to the time within which an accrual method taxpayer may make a contribution which will be allowable as a deduction for such taxable year, no deduction is allowable for such year but the employer is entitled to a "credit carryover" for the year or years in which the commitment is paid. If the contributions paid, in such subsequent year, do not exceed the primary limitation of fifteen percent of compensation of participants then the "credit carryover" is not applicable. If such contributions do exceed such primary limitation, then to the extent that they do not exceed the lesser of (a) thirty percent of compensation of participating employees for such year, or (b), the primary limitation of fifteen percent plus the "credit carryover" from prior years, they are deductible.

Advice has been requested concerning the deductibility of contributions made by an employer to a qualified employees' profit-sharing plan when the payment required for a particular taxable year is made subsequent to the time prescribed by section 404(a)(6) of the Internal Revenue Code of 1954.

Under the provisions of a certain qualified employees' profit-sharing plan, the employer corporation is committed to make an annual contribution equal to the lesser of ten percent of corporate profits or fifteen percent of compensation of participating employees. For the year 1954, ten percent of corporate profits equalled \$10,000 while fifteen percent of compensation of participating employees equaled \$20,000. The contribution of \$10,000 thus required for the year 1954, however, was not made until a few days after the expiration of the time within which an accrual basis taxpayer may make a contribution to an employees' trust which will be allowable as a deduction for the prior taxable year.

For the taxable year 1955, a contribution of \$15,000 was required of the employer since ten percent of corporate profits equalled \$15,000 while fifteen percent of compensation of participating employees equaled \$20,000. The \$15,000 contribution for 1955 was timely made. Thus, a total of \$25,000 was paid into the profit-sharing trust by the employer within the taxable year 1955. No carryovers of any kind exist from years prior to 1954.

Section 404(a) of the Code provides in part that, if contributions are paid by an employer to or under a profit-sharing plan, such contribu-

tions, in order to be deductible, must be expenses which would be deductible under section 162 of the Code, relating to trade or business expenses, or section 212, relating to expenses for production of income, if it were not for the provision in section 404(a) that they are deductible, if at all, only under section 404(a) of the Code. Section 404(a)(3)(A) sets forth the limitations on deductible contributions to profit-sharing trusts. That section provides that contributions shall be deductible in the taxable year when paid, in an amount not in excess of fifteen percent of the compensation otherwise paid or accrued during the taxable year to all employees under the profit-sharing plan. If in any taxable year there is paid into the trust amounts less than fifteen percent of compensation of participating employees, the excess, or if no amount is paid, the amounts deductible, shall be carried forward and be deductible when paid in the succeeding taxable years in order of time, but the amount so deductible under this limitation in any such succeeding taxable year shall not exceed fifteen percent of the compensation otherwise paid or accrued during such succeeding taxable year to the beneficiaries under the plan.

Pertinent parts of section 1.404(a)-9 of the Income Tax Regulations state that the primary limitation on deductions for a taxable year is fifteen percent of the compensation otherwise paid or accrued during such taxable year to the employees who, in such year, are beneficiaries of the trust funds accumulated under the plan. So long as the contributions do not in any year exceed the primary limitation, this is the only limitation under section 404(a)(3)(A) which

has any effect. In order that the deductions may average fifteen percent of compensation otherwise paid or accrued over a period of years, where contributions in some taxable year are less than the primary limitation but contributions in some succeeding taxable year exceed the primary limitation, deductions in each succeeding year are subject to a secondary limitation instead of to the primary limitation. The secondary limitation for any year is equal to the lesser of (1) twice the primary limitation for the year or (2) any excess of (a) the aggregate of the primary limitations for the year and for all prior years over (b) the aggregate of the deductions allowed or allowable under the limitations provided in section 404(a)(3)(A) for all prior years.

Under the provisions of section 404(a)(6) of the Code, a taxpayer on the accrual basis is deemed to have made a payment, to a profit-sharing trust created or organized within the United States, on the last day of the year of accrual if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year, including extensions thereof.

To the extent an employer commits itself to make contributions to a profit-sharing plan in effect on the last day of a particular taxable year, the amount of the contribution required accrues as at the end of such year. But for the requirement of section 404(a) of the Code that the contribution be paid in order to be allowed as a deduction, the entire amount of the contribution would be deductible for the year of accrual to the extent it represents an ordinary and

necessary business expense and constitutes reasonable compensation for services rendered. This is true whether the contribution is paid in the year of accrual or some subsequent year.

The requirements of section 404(a) have the effect of (1) deferring a deduction of the accrued contribution until the taxable year when paid and (2) limiting the amount of the deduction to the percentage set forth therein for a particular taxable year. In applying the limitations, contributions not in excess of the plan's commitments, for the current or any prior year, need not be identified. Thus, if contributions required for the year 1954 are paid within the taxable year 1954, including the period provided by section 404(a)(6), they represent amounts deductible, subject to the limitations of section 404(a)(3)(A) of the Code. If the contributions do not exceed the fifteen percent primary limitation provided therein, then the so-called "credit carryover" is not applicable. On the other hand, if such contributions do exceed such primary limitation, then, to the extent that they do not exceed the lesser of (a) thirty percent of compensation of participating employees for such year, or (b) the primary limitation of fifteen percent plus the "credit carryover" from prior years, they are deductible. The "credit carryover" referred to in the secondary limitation in the preceding sentence is the term generally used to refer to the excess of the aggregate of the primary limitations for the year and for all prior years over the aggregate of the deductions allowed or allowable under the limitations provided in section 404(a)(3)(A) for all prior

years, referred to in section 1.404(a)-9(d) of the Income Tax Regulations. See Mimeograph 6131, C. B. 1947-1,21.

The application of the principles set forth above, as applied to the facts stated herein, is illustrated in the following tabulation (figures represent thousands of dollars):

Year	Commitment under the plan	Contributions paid	Primary limi- tation, 15 percent of compensation	Credit carryover	Amount deductible
1954.....	10	None	20	20	¹ None
1955.....	15	25	20	² (5)	25
Totals.....	25	25	40	15	25

¹ See Rev. Rul. 56-674, C.B. 1956-2, 293.

² \$5,000 of the credit carryover from 1954 is being used in 1955, leaving a net carryover at the end of 1955 of \$15,000.

Note: On the last day of each year, the amounts required under the plan for that year accrued and remained an obligation of the employer until paid or contributed; therefore, to the extent the commitment was paid, it was deductible in the year of payment within the limitations of section 404(a)(3)(A). Since the \$25,000 contributions, paid in 1955, exceeded the primary limitation of fifteen percent of compensation of participants, it became necessary to determine the amount of the secondary limitation. As the secondary limitation (the lesser of thirty percent of compensation for the year 1955, which equals \$40,000, or fifteen percent of such compensation plus the "credit carryover" of \$20,000 from 1954, which equals \$40,000) exceeded the amount paid in 1955, the entire contribution of \$25,000 is deductible for that year.

No. 16534

United States Court of Appeals
For the Ninth Circuit

TIME OIL COMPANY, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

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TAX COURT OF THE UNITED STATES TO ACCORD WITH THE
MANDATE OF THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF PETITIONER

JONES, GREY, KEHOE, HOOPER & OLSEN

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THE ARGUS PRESS, SEATTLE



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OPINION BELOW

The decision of the Tax Court (R. 21) was entered
April 7, 1959.

STATEMENT AS TO JURISDICTION

This is a petition to review and correct the above
decision of the Tax Court of the United States to accord
with the mandate of this Court, dated September 8,
1958, remanding the case to the Tax Court for further
proceedings. The decision of the Tax Court was entered
April 7, 1959, after respondent filed a recomputation
pursuant to the mandate of this Court and petitioner
filed a recomputation and objections to respondent's
recomputation, and after oral argument of both pe-
titioner and respondent at Washington, D.C., on April

1, 1959, the Tax Court's decision approved respondent's recomputation. Petitioner filed the Petition to Correct the Decision of the Tax Court to accord with the Mandate of the United States Court of Appeals for the Ninth Circuit on May 4, 1959, and served and filed a Notice of Filing Petition to Correct the Decision of the Tax Court on May 5, 1959. The jurisdiction of this Court is based on Section 7481 (3) (B) (iii) of the Internal Revenue Code as amended, petitioner's petition being filed within the thirty-day period provided therein.

NATURE OF CONTROVERSY AND ARGUMENT

Petitioner's recomputation for entry of decision pursuant to the mandate of the Court of Appeals for the Ninth Circuit would result in a deficiency for 1949 of \$24,522.81, and a deficiency for 1950 of \$1,233.22. Respondent's recomputation and the Tax Court's decision which followed respondent's recomputation resulted in a deficiency for 1949 of \$32,588.60 and a deficiency for 1950 of \$22,889.39.

The Court of Appeals' ultimate decision was:

“After taking the view of the law hereinabove indicated, this Court must now come to the question of the year of deductibility of the employer's payments. The Third Circuit has taken the view that taxpayer on an accrual basis is entitled to deduct promissory notes as a contribution in the year issued. *Sachs and Slaymaker v. Commissioner*, 208 F.2d 313. This Court fully agrees with the case of *Anthony P. Miller, Inc.*, 3 Cir. 164 F. 2d 268 (on its facts) upon which the Court of Ap-

peals for the Third Circuit relies in *Sachs and Slaymaker*. Under Section 23(p)(1) E of the 1939 Code a taxpayer 'on the accrual basis shall be deemed to have made a payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year.' The *Sachs-Slaymaker* decision is a reasonable, but not a required extension of the *Miller* case. The point is a close one. In such circumstances it seems unnecessary to set up a conflict between circuits. *Therefore, it is held that delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date.* This would determine the year of deductibility.

"In the background of this case is the question of amounts allowable as deductions under permissible limits of the statute. It would appear that under the principles laid down *the allowable deductions can be readily calculated by the tax court for the years in which the note obligations were discharged.*" (Emphasis ours).

There were four note contributions involved in the proceeding.

The first note was in the amount of \$30,466.86. While the note was dated January 10, 1948, and was issued presumably as a contribution for the year 1947, the record shows (Tr. 28) that it was not delivered to the trustees until May of 1948. The record further shows that the respondent denied petitioner a deduction for the \$30,466.86 in the year 1947, and that petitioner signed a waiver of restrictions on assessment and

collection of the resulting deficiency in tax (Tr. 28 and 29).

The second note is in the amount of \$66,342.82 and was issued February 28, 1949, presumably as a contribution for the year 1948. The record shows (Tr. 29) that the respondent disallowed this as a deduction for petitioner in 1948 and petitioner signed a waiver of restrictions on assessments and collection of the resulting deficiency in tax.

The third note is in the amount of \$84,568.49 and was issued February 15, 1950.

The fourth note was in the amount of \$25,067.96 and was issued April 17, 1950.

The only amounts in controversy in this petition to correct the decision of the Tax Court to accord with the mandate of the United States Court of Appeals are the \$30,466.86 represented by the note dated January 10, 1948, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949. The recomputation of the respondent and the Tax Court's decision would throw the deduction for the amounts of \$30,466.86 and \$42,347.54 into the year 1948, which is now a barred year, and this would deny petitioner any benefits from the deduction whatsoever despite the fact that respondent had previously denied petitioner any deduction for these amounts in the years 1947 and 1948 in the first place when taxpayer had so taken them.

One important consideration should be initially noted. This case was remanded at respondent's insist-

ence in footnote 12 of his brief to enable the Tax Court to determine the allowable deductions under the primary and secondary limitations of Section 23(p)(1)(C) of the Code and Regulations 111, Sec. 29.23 (p)-10 relating thereto. There is no disagreement between the parties hereto that the full amounts of deductions as now asserted by petitioner would be allowable under the primary and secondary limitations of the Statute and Regulations referred to (R. 15).

The position of the respondent and the Tax Court is premised on a construction of the Court of Appeals' ultimate decision to the effect that the note issued in May of 1948 in the amount of \$30,466.86 has to be charged to that year since it was issued in that year more than sixty days after the close of the year 1947, and \$42,347.54 of the \$66,342.82 note issued February 28, 1949, has to be charged to that same 1948 year because the note was a contribution for the year 1948 and constituted payment on the last day of that year because it was issued within sixty days of the close of that year. The \$42,347.54 is the maximum respondent can allocate to the year 1948 under the limitation of 15% of the aggregate compensation of eligible employees for that year.

It is the position of the petitioner that the Court of Appeals in this case authorized the deduction for the \$66,342.82 in the year 1949 since the note was delivered in the year 1949.

The Court of Appeals was following the position of the Third Circuit in *Sachs and Slaymaker v. Com-*

missioner, 208 F.2d 313, in holding that “delivery of the notes to the trustee constituted payment by Time Oil Company as of the delivery date.” Had the Court of Appeals intended to relate the payment back to the last day of 1948 under Section 23(p)(1)(E) providing that a taxpayer “on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year,” it would have said so. It is petitioner’s position that the Court of Appeals was aware of the fact that respondent had already denied petitioner a deduction for this amount in 1948 and that petitioner had filed a waiver and paid the resulting deficiency (Tr. 29).

In addition, the position of the Tax Court and the respondent on the \$66,342.82 note issued in 1949 completely overlooks one important aspect of Section 23 (p)(1)(E) of the Code. While Section 23(p)(1)(E) provides that a taxpayer “on the accrual basis shall be deemed to have made payment on the last day of the year of accrual if the payment is on account of such taxable year and is made within sixty days after the close of the taxable year,” the accrual has been deemed to be permissive rather than mandatory.

The American Law Institute “Basic Pension and Profit-Sharing Plans” (June, 1957), pages 16 and 17, point this out in stating:

“Even though the employer is on the accrual basis of accounting, the general rule is that contributions under a qualified plan are deductible only

for the taxable year of the employer in which they are paid. However, since the largest proportion of employers are on the accrual basis, there is an exception to this general rule which is a tail that wags the dog. It is that an accrual basis employer may accrue a contribution as of the last day of the employer's taxable year and deduct the contribution, subject to the applicable limitations as to amount, if it is actually paid by the due date for filing the employer's income tax return for the taxable year. Before the 1954 Code, the accrued contribution had to be paid within sixty days after the end of the taxable year."

The Commissioner's own regulations established the permissive nature of the deduction. In Regulations 111, Section 29.23(p)-1, referring to Section 23(p)(1)(E) of the Code, the Commissioner states:

"This latter provision is intended to permit a taxpayer on the accrual basis to deduct such accrued contribution or compensation provided payment is actually made within sixty days after the close of the year of accrual."

It would appear to petitioner that it would be astounding indeed if respondent could here deny this petitioner a permissive deduction in 1948 and then, after petitioner acquiesces in such denial, later force the deduction back to that year when any benefit is barred by the Statute of Limitations.

It is petitioner's position that the Court of Appeals authorized the deduction of even the \$30,466.86 note in 1949 when paid, even though issued in 1948, when it concluded:

“It would appear that under the principles laid down, the allowable deductions can readily be calculated by the Tax Court for the years in which the note obligations were discharged.”

The use of the word “discharged” would clearly indicate a deduction at the time of payment of the note if deduction had not been allowed at the time the note was issued.

Petitioner’s contentions do not in any way distort income or advance principles incompatible with equity.

As shown by petitioner’s recomputation (R. 15) the amounts of allowable deductions under the primary and secondary limitations of Sections 23(p)(1)(C) of the Code and Regulations 111, Section 29.23(p)-10 relating thereto are \$103,124.62 and \$131,131.50 for the years ending December 31, 1949, and December 31, 1950, respectively, while the actual amounts of the deduction here asserted by petitioner are \$96,809.68 for 1949, and \$109,636.45 for 1950.

From the standpoint of equity not only is it completely one-sided in favor of petitioner but respondent might well be precluded by estoppel or election in that he denied the deductions to petitioner in the first place, in the prior years, and he now insists on relating the deductions back to the prior years when the Statute of Limitations bars any benefit to petitioner.

The following cases demonstrate the application of estoppel or election in analogous situations and, while they are all instances where the doctrine has been successfully asserted against the taxpayer, the doctrine is

likewise available against the Government, even though, as pointed out by the Court of Appeals for the District of Columbia in *Vestal v. Commissioner*, 152 F. 2d 132; "the doctrine of election and estoppel must be applied with great caution to the Government and its officials. But in proper circumstances it does apply."

In the case of *F. R. Daugette v. Patterson*, 250 F. 2d 753 CA-5, cert. denied 356 U.S. 902, the court held that a taxpayer was estopped on a claim for refund after signing an 870-AD settlement agreement with the Government, even though it was not a final closing agreement, and then filing a claim for refund on the last day of the period open under the Statute of Limitations, the court holding estoppel applicable because the Government could not reinstate the deficiencies originally proposed because of the Statute of Limitations.

In the case of *Stern Bros. v. U.S.*, 8 F.Supp. 705, the taxpayer deducted thirteen months' rent in the year 1929 and eleven months' rent in the year 1930. After the Government had acquiesced in the deduction for the year 1929, and after the Statute of Limitations had run on that year, the taxpayer filed a claim for refund for the year 1930 alleging that it was entitled to a deduction for twelve months' rent in that year. The court held that the taxpayer was estopped in pressing its claim for refund for 1930 since the Government was barred by the Statute of Limitations from making proper adjustments for the year 1929.

In the cases of *Houbigant, Inc.*, 31 B.T.A. 954; aff'd

80 F.2d 1012; Cert. denied, 298 U.S. 699; and *Victoria Paper Mills Co.*, 32 B.T.A. 666; aff'd 83 F.2d 1022, the courts held that where over a period of years a taxpayer, keeping its books on the accrual basis, deducts and is allowed in its income tax returns for such years taxes or customs duties currently accrued and paid and in a later year it is determined that by reason of over-valuations, or the application of excessive rates under valid laws, the amounts theretofore paid were excessive and a portion thereof is refunded and where it further appears that the income tax returns for the years in respect of which the deductions were taken and allowed are not then open to adjustment, the amount refunded is to be treated as taxable income in the year in which the refund is made.

The case of *Elsie S. Eckstein*, 41 B.T.A. 746, went even further. There the taxpayer had accrued an excessive amount and after the Commissioner had acquiesced and the statute had run on the year of accrual the taxpayer adjusted the books of account in a later year. The court held that the over-accrual was taxable income in the later year. The court said "While in the instant case the petitioner did not actually pay the real property taxes for 1932 and secure a refund in the taxable year as in *Houbigant, Inc.* and *Victoria Paper Mills Co.* cited above, the actual payment of the taxes is of no moment. In those cases, as in the instant case, the books of account were kept and income reported by the accrual method and the right to the deduction claimed rested in each instance upon the actual accrual on the books of account of the amount of such

taxes then considered to be the amount properly accruable, and in each case the correct amount of such taxes was determined and the previous accrual was adjusted in the year before us. On authority of the cases cited, the respondent's treatment of the real property taxes for 1932 is sustained." The respondent's treatment was that the 1932 over-accrual of taxes constituted taxable income in 1934 to the extent of the reduction on the books to reflect the difference between the amount accrued and the amount ultimately paid. The court noted that the Commissioner had approved taxpayer's 1932 accrual and the Statute of Limitations had run on reopening that year.

CONCLUSION

It is petitioner's position that the Court of Appeals intended to give this trust the complete tax benefits it was entitled to as a qualified trust despite "the shortcomings of the errant taxpayer." It did not intend to give 60% relief through the construction advanced by the respondent and adopted by the Tax Court.

Respectfully submitted,

JONES, GREY, KEHOE, HOOPER & OLSEN
A. R. KEHOE

HARGRAVE A. GARRISON
Counsel for Petitioner.

610 Colman Building,
Seattle 4, Washington.

No. 16536 ✓

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Appellant,

vs.

ROSCOE B. SMITH and IDA SMITH, RONALD
G. CALLAHAN, HAROLD L. SMITH and
RUTH SMITH,

Appellees.

Transcript of Record

FILED

OCT 19 1959

Appeal from the United States District Court for the
District of Arizona

PAUL P. O'BRIEN, CLERK

No. 16536

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Appellant,

vs.

ROSCOE B. SMITH and IDA SMITH, RONALD
G. CALLAHAN, HAROLD L. SMITH and
RUTH SMITH,

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Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Ronald M. Smith.

GORODEZKY, MITCHELL and STUART,
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Phoenix, Arizona,

Attorneys for Appellees

Roscoe B. Smith and
Ida Smith.

In the District Court of the United States
For the District of Arizona

No. Civ. 2675 Phx.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Plaintiff,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
d/b/a SWAN CLEANERS; RONALD G.
CALLAHAN, a Minor; HAROLD L. SMITH
and RUTH M. SMITH, His Wife; RONALD
M. SMITH, a Minor; JOHN DOE, JANE
DOE and BLACK CORPORATION,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

For its claim against defendants above named
plaintiff alleges:

I.

At all times herein mentioned:

(a) Plaintiff United States Fidelity and Guar-
anty Company (hereinafter called the "insurer")
was and it now is a corporation duly organized and
existing under the laws of the State of Maryland
and authorized to transact its corporate business as
a liability insurer within the State of Arizona.

(b) Defendants Roscoe B. Smith and Ida Smith
(hereinafter called the "insureds") were and they

now are husband and wife, d/b/a Swan Cleaners, and citizens and residents of the State of Arizona.

(c) Defendant Ronald G. Callahan was and he now is a citizen and resident of the State of California.

(d) Defendants Harold L. Smith and Ruth M. Smith were and they now are husband and wife and the parents of Ronald M. Smith, and all of said defendants were and they now are citizens and residents of the State of Arizona.

(e) The names John Doe, Jane Doe and Black Corporation are fictitious; the true names and citizenship of these defendants are unknown to the plaintiff. Plaintiff asks leave of this Court to substitute the true names of these defendants when the same shall hereafter become known.

II.

The amount in controversy herein exceeds the sum of \$3,000.00 exclusive of interest and costs in that:

(a) The policy of insurance, hereinafter more particularly described, which the insurer issued to the insureds contains coverage limits in excess of \$3,000.00.

(b) Plaintiff is informed and believes and upon such information and belief alleges that defendants Harold L. Smith, Ruth M. Smith, John Doe, Jane Doe and Black Corporation intend to file claims in excess of \$3,000.00 for damages on account of per-

sonal injuries sustained by defendant Ronald M. Smith.

III.

On or about March 8, 1957, the insurer issued and delivered to the insureds a comprehensive general-automobile liability insurance policy, No. CLP 38913, for the period of one year commencing March 8, 1957. Said policy was made to apply to a 1950 Willys station wagon (hereinafter called the "insured automobile") bearing motor or serial No. P 14709, belonging to and owned by defendants Roscoe B. Smith and Ida Smith, his wife. By the terms of the aforesaid policy the insurer agreed, insofar as pertinent to this claim, as follows:

1. To pay on behalf of the insureds all sums which the insureds shall become legally obligated to pay as damages because of bodily injury, sickness or disease, sustained by any person and caused by accident.

2. With respect to the aforesaid insurance, to defend any suit against the insureds alleging such injury, sickness or disease and seeking damages on account thereof, even if such suit is groundless, false or fraudulent.

3. The aforesaid insurance shall apply to the insureds or to any person using the insured automobile with the permission of the insureds.

IV.

At approximately 6:30 a.m. on March 28, 1957, defendant Ronald G. Callahan was driving the in-

sured automobile in a westerly direction on U. S. Highway 60-70 near Mile Post No. 182.4 approximately $2\frac{1}{4}$ miles east of Mesa, Arizona, and defendant Ronald M. Smith was riding therein as a passenger. At said time and place an accident occurred as a result of which defendant Ronald M. Smith sustained bodily injuries. The exact nature, character and extent of said injuries are unknown to plaintiff.

V.

At the time of the aforesaid accident defendant Ronald G. Callahan was not an agent or servant of the insureds and did not have authority or permission from the insureds to use the aforesaid insured automobile; said defendant occupied no legal relationship with the insureds which could in any way subject the insureds to liability for said accident; and the insureds are not in any way liable or responsible for said accident.

VI.

By reason of the facts hereinabove alleged there exists no duty or legal obligation on the part of the insurer to defend any suit against the insureds and Ronald G. Callahan, or any of them, seeking damages on account of the bodily injuries arising out of the accident as described in Paragraph IV of this complaint; and there exists no duty or legal obligation on the part of the insurer to pay any sum for or in satisfaction of any judgment obtained by defendants Harold L. Smith, Ruth M. Smith, Ron-

ald M. Smith, John Doe, Jane Doe and Black Corporation, or any of them, against the insureds and Ronald G. Callahan, or any of them, for damages caused or bodily injuries sustained by reason of the accident described above in Paragraph IV.

VII.

The defendants above named claim and in the future will claim, and the plaintiff admits, that the above-numbered policy was in full force and effect on the date of the aforesaid accident. The defendants above named claim and in the future will claim, but plaintiff denies, that said policy extended or afforded coverage to the insureds and defendant Ronald G. Callahan, or either or any of them, while defendant Ronald G. Callahan was driving the insured automobile as aforesaid, and that as a consequence the insurer is legally obligated to pay within the limits specified in said policy damages because of the bodily injuries sustained by defendant Ronald M. Smith and to defend any suit or suits which may be filed seeking damages on account thereof.

VIII.

An actual controversy exists between plaintiff and defendants depending for its determination upon a proper construction and interpretation of the comprehensive general-automobile liability insurance policy described above in Paragraph III.

Wherefore, plaintiff prays that the court adjudge and decree:

1. That under the comprehensive general-automobile liability insurance policy No. CLP 38913 described above in Paragraph III no coverage is extended or afforded to defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan, or any of them, in connection with the automobile accident described in Paragraph IV.

2. That plaintiff is not legally obligated to defend any suit against the defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan, or any of them, seeking to recover damages or bodily injuries arising out of the accident above described in Paragraph IV.

3. That plaintiff is not obligated to pay any judgment which defendants Harold L. Smith, Ruth M. Smith, Ronald M. Smith, John Doe, Jane Doe and Black Corporation, or any of them, may obtain against defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan, or any of them, arising out of the accident above described in Paragraph IV.

4. That defendants Harold L. Smith, Ruth M. Smith, Ronald M. Smith, John Doe, Jane Doe and Black Corporation, and each of them, be restrained and enjoined from instituting and maintaining any action for or on account of any injuries or damages sustained in the accident above described in Paragraph IV in any court whatsoever.

5. That plaintiff have and recover its costs herein incurred together with such other and fur-

ther relief as to the court shall appear meet and proper in the premises.

MOORE & ROMLEY,

By /s/ JARRILL F. KAPLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed June 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendants, Roscoe B. Smith, Ida Smith, d/b/a Swan Cleaners, Harold L. Smith and Ruth M. Smith, and Ronald M. Smith, by and through their attorney, Wm. P. Lutfy, and for their answer to plaintiff's Complaint, admit, deny and allege:

I.

Defendants admit the allegations contained in paragraphs I, II, III and IV.

II.

Defendants deny the allegations contained in paragraph V and in this connection allege that the defendant Ronald G. Callahan was using insureds' automobile with the permission and authority of the defendant Roscoe B. Smith and that the plaintiff is liable for the injuries and damages sustained by the defendants Harold L. Smith and Ruth M.

Smith and their minor son, Ronald M. Smith, at the time insureds' automobile was being driven by the defendant Ronald G. Callahan which was involved in an accident resulting in serious injuries to the defendant Ronald M. Smith.

III.

Defendants deny all of the allegations contained in paragraph VI.

IV.

Defendants admit that said policy of insurance issued by the plaintiff to the defendants Roscoe B. Smith and Ida Smith d/b/a Swan Cleaners was in full force and effect at the time the automobile covered thereunder was involved in an automobile accident injuring the defendant Ronald M. Smith.

Further answering said paragraph VII defendants admit that they claim that said policy extended or afforded coverage to the insureds and defendant Ronald G. Callahan, or either or any of them, while defendant Ronald G. Callahan was driving the insured automobile as aforesaid, and that as a consequence the insurer is legally obligated to pay within the limits specified in said policy damages because of the bodily injuries sustained by defendant Ronald M. Smith and to defend any suit or suits which may be filed seeking damages on account thereof.

V.

Defendants admit the allegations contained in paragraph VIII.

VI.

Further answering said Complaint and as a matter of affirmative defense thereto, defendants allege that plaintiffs' Complaint does not state facts sufficient to constitute a cause of action against the defendants upon which relief can be granted.

Wherefore having fully answered plaintiff's Complaint, defendants pray that plaintiff take nothing by reason thereof and that they have Judgment against the plaintiff for their costs.

/s/ WM. P. LUTFY,

Attorney for the Defendants, Roscoe B. Smith, Ida Smith, Harold L. Smith, Ruth M. Smith and Ronald M. Smith.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 12, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT
RONALD G. CALLAHAN

Comes now Ronald G. Callahan, one of the defendants in the above-entitled cause, and for his Answer to plaintiff's Complaint, admits, denies and alleges:

I.

Defendant admits the allegations contained in paragraph I.

II.

Defendant has no knowledge as to the matters and things alleged in paragraphs II and III of plaintiff's Complaint and therefore demands strict proof of the same.

III.

Defendant admits the allegations contained in paragraph IV of plaintiff's Complaint.

IV.

Defendant denies the allegations contained in paragraph V of plaintiff's Complaint and in this connection defendant alleges that he was driving said automobile with the consent and permission of the defendant Roscoe B. Smith.

V.

Defendant admits the allegations contained in paragraph VII of plaintiff's Complaint.

VI.

Defendant has no knowledge as to the matters and things alleged in paragraph VIII and therefore denies the same.

VII.

Further answering said Complaint, defendant alleges that he is a minor under twenty-one years of age and requests the Court to appoint some fit and proper person as Guardian ad Litem for the purpose of defending him in the above-entitled cause.

Wherefore defendant having fully answered plaintiff's Complaint prays:

1. That plaintiff take nothing by reason thereof.
2. That the Court appoint some fit and proper person as Guardian ad Litem to defend the defendant in the above-entitled cause.
3. For his costs.

/s/ RONALD G. CALLAHAN,
Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 28, 1957.

[Title of District Court and Cause.]

STIPULATION, CONSENT AND ORDER
APPOINTING GUARDIAN AD LITEM

It Is Hereby Stipulated by and between Moore & Romley, attorneys for the plaintiff, and Wm. P. Lutfy, attorney for the defendants, Roscoe B. Smith and Ida Smith, his wife, d/b/a Swan Cleaners, Harold L. Smith and Ruth M. Smith, his wife, Ronald M. Smith, a minor, John Doe, Jane Doe, and Black Corporation, that the Court may enter an order appointing Dan Cracchiolo guardian ad litem for the defendant, Ronald Callahan, for the pur-

pose of defending the said Ronald Callahan in the above-entitled cause.

Dated at Phoenix, Arizona, this 10th day of September, 1957.

MOORE & ROMLEY,

By /s/ JARRILL F. KAPLAN,
Attorneys for the Plaintiff.

/s/ WM. P. LUTFY,
Attorney for the Defendants.

Comes now Dan Cracchiolo and consents to act as guardian ad litem for the defendant, Ronald Callahan, for the purpose of defending the said Ronald Callahan in the above-entitled cause

Dated at Phoenix, Arizona, this 10th day of September, 1957.

/s/ DAN CRACCHIOLO.

Order upon the written stipulation of the attorneys for the plaintiff and the defendants, Roscoe B. Smith and Ida Smith, his wife, d/b/a Swan Cleaners, Harold L. Smith and Ruth M. Smith, his wife, Ronald M. Smith, a minor, John Doe, Jane Doe, and Black Corporation, and the consent of Dan Cracchiolo be and he is hereby appointed guardian ad litem for the defendant, Ronald Callahan, for the purpose of defending said defendant in the above-entitled cause.

Done in Open Court and dated at Phoenix, Arizona, this 12th day of September, 1957.

/s/ DAVE LING,

Judge of the District Court of the United States
in and for the District of Arizona.

[Endorsed]: Filed September 12, 1957.

[Title of District Court and Cause.]

COUNTERCLAIM OF THE DEFENDANTS
HAROLD L. SMITH, RUTH M. SMITH,
His Wife, and RONALD M. SMITH

The defendants Harold L. Smith, Ruth M. Smith, his wife, and Ronald M. Smith, for their counterclaim against the plaintiff, United States Fidelity and Guaranty Company, a Corporation, allege:

I.

On or about the 8th day of March, 1957, the plaintiff, United States Fidelity and Guaranty Company, a corporation, issued and delivered to the defendants Roscoe B. Smith and Ida Smith, his wife, a certain comprehensive general automobile liability insurance policy, No. CLP 38913, said policy to have effect for a period of one year commencing March 8, 1957. Said policy covered the operation within the terms thereof of a 1950 Willys station wagon, hereinafter called the insured automobile, bearing

Motor or Serial No. P 14709, which said vehicle was owned by Roscoe B. Smith and Ida Smith, his wife. By the terms of the described policy the plaintiff agreed to pay on behalf of the defendant Smith all sums which said defendants shall become legally obligated to pay as damages because of bodily injury, sickness or disease sustained by any person and caused by accident when the described vehicle was being used by the defendants Smith or with their permission. As is more fully set forth in the cross-claim filed in this cause by these counter-claimants and against the defendants Smith and the defendant Ronald Callahan, an accident occurred involving the insured vehicle at a time when said vehicle was being operated by the defendant Callahan with the consent and permission of the defendants Smith.

II.

The plaintiff claims that it is in no wise liable under the terms of its policy of insurance to the defendants Smiths or to these cross-complainants for injuries caused by the negligence of the operator of said insured vehicle at the time of the accident described in said cross-claim notwithstanding the fact that said vehicle was and at said time operated in accordance with the provisions of the policy of insurance described above.

Wherefore, cross-complainants pray:

1. That the policy of insurance described in this cross-complaint extended coverage to the defend-

ants Roscoe B. Smith, Ida Smith, and Ronald Callahan at the time of the accident described in the cross-claim herein, and that the plaintiff is bound to pay and satisfy any judgment which may be obtained by these cross-complainants against the defendants Roscoe B. Smith, Ida Smith, his wife, and Ronald Callahan, or any of them.

THOMAS H. CROAFF,
SCOTT, CAVNESS & YANKEE,

By /s/ JACK C. CAVNESS,
Attorneys for Cross-
Claimants.

[Endorsed]: Filed October 21, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
NOVEMBER 13, 1958

Honorable Dave W. Ling, United States District
Judge, Presiding.

This case comes on regularly for trial this day. Jarrill F. Kaplan, Esq., appears for the plaintiff. Jack Cavness, Esq., and Thomas J. Croaff, Jr., Esq., appear for the defendants Harold L. Smith, Ruth M. Smith and Ronald Smith. Murray Stuart, Esq., appears for the defendants, Roscoe B. Smith and Ida Smith.

Both sides announce ready for trial.

Plaintiff's Case:

Plaintiff's exhibit 1, Insurance Policy, is admitted in evidence.

Roscoe B. Smith is sworn and cross-examined as an adverse party.

Ronald G. Callahan is called as a witness by counsel for the plaintiff, and fails to respond.

Plaintiff's exhibit 2, Deposition of Ronald G. Callahan, is admitted in evidence.

Harold J. Johnson is sworn and examined on behalf of the plaintiff.

The plaintiff rests.

Jack Cavness, Esq., on behalf of the defendants moves for judgment against the plaintiff. The Court reserves ruling.

Defendants' Case:

Harold Smith is sworn and examined in his own behalf.

The defendants, Harold L. Smith, Ruth M. Smith and Ronald Smith rest.

The defendants, Roscoe B. Smith and Ida Smith rest, and counsel for said defendants asks and is granted leave to introduce evidence at a later date as to attorney's fees.

Both sides rest.

It Is Ordered that the record show this case is submitted subject to the filing of briefs; that the plaintiff is allowed 20 days to file brief and the defendants allowed 10 days to answer.

[Title of District Court and Cause.]

REPLY TO COUNTERCLAIM OF HAROLD L.
SMITH, RUTH M. SMITH AND RONALD
M. SMITH

For its reply to the Counterclaim of Defendants Harold L. Smith, Ruth M. Smith and Ronald M. Smith, plaintiff, United States Fidelity and Guaranty Company, alleges:

I.

It admits all of the allegations of Paragraph I with the exception of the allegations contained in the last sentence thereof, and as to the latter, the same are denied.

II.

Plaintiff admits that it claims that it is in no way liable under the terms of its policy of insurance to the defendants Smiths or to counterclaimants for injuries caused by the negligence, if any, of the operator of said insured vehicle at the time of the accident described in the counterclaim, and plaintiff denies the remaining allegations of Paragraph II.

Wherefore, plaintiff prays for judgment in accordance with the prayer of plaintiff's complaint.

MOORE & ROMLEY,

By /s/ JARRILL F. KAPLAN,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed November 13, 1958.

[Title of District Court and Cause.]

MINUTE ENTRY OF FRIDAY,
FEBRUARY 27, 1959

Honorable Dave W. Ling, United States District
Judge, Presiding.

This cause having been submitted and by the
Court taken under advisement,

It Is Ordered that judgment will be entered for
the defendants upon plaintiff's complaint for de-
claratory relief, upon findings to be submitted under
the rules.

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW; RE-
QUEST FOR ADDITIONAL FINDINGS
AND CONCLUSIONS; AND REQUEST
FOR HEARING

Objections to Proposed Findings of
Fact and Conclusions

Plaintiff respectfully objects to proposed Finding
of Fact No. 6 insofar as the same finds that de-
fendant Callahan was driving the insured automo-
bile "with the permission of the insureds" for the
following reasons:

1. Said finding is contrary to law.

2. Said finding is contrary to the undisputed evidence.

3. Said finding is contrary to the weight of the evidence.

4. Said finding is vague and indefinite in that the finding fails to state whether Callahan was driving with the "actual" permission of the insureds, or the "implied" permission of the insureds, or whether the finding is merely that Callahan was initially, in the month of January, 1957, given permission to drive the insured automobile.

Plaintiff respectfully objects to proposed Conclusion of Law No. 2 for the following reasons:

1. Said conclusion is contrary to law.

2. Said conclusion is contrary to the undisputed evidence.

3. Said conclusion is contrary to the weight of the evidence.

4. Said conclusion is vague and indefinite in that it is impossible to ascertain therefrom whether the Court concluded:

(a) That Callahan was initially given permission to drive the insured automobile, and therefore he had permission to use the automobile for all purposes; or

(b) That Callahan was using the insured automobile at the time and place of the accident in

question with the “actual” permission of the named insureds; or

(c) That Callahan was using the insured automobile at the time and place of the collision with the “implied” permission of the named insureds.

Request for Additional Findings and Conclusions

Plaintiff respectfully requests the Court to make the following additional findings:

1. That defendant Roscoe B. Smith originally gave defendant Ronald G. Callahan permission to use the insured automobile for transportation to and from work, for use while working for defendant Roscoe B. Smith and for use on errands to the grocery store and drug store.

2. That at the time of the accident on March 28, 1957, Callahan was not using the insured automobile for transportation to or from work; nor was he working nor on any business for the named insureds; nor was he on any errand.

3. That the words “and owned by defendants Roscoe B. Smith and Ida Smith, his wife,” be inserted at the end of Proposed Finding No. 4.

4. That the words “with the permission of the insureds” appearing at the end of Proposed Finding No. 5 be stricken and the following words be substituted in lieu thereof: “provided the actual

use thereof was with the permission of the named insureds.”

5. That the word “with” appearing in the second line of Proposed Finding No. 6 be stricken and the word “without” be substituted in lieu thereof.

6. In the alternative to request No. 6 immediately above, and in the event said request is denied, that the Court find whether Callahan had initial permission, actual permission or implied permission.

7. That the word “extended” appearing in the third line of proposed Conclusion of Law No. 2 be stricken and the words “did not extend” be substituted in lieu thereof.

8. In the alternative to request No. 7 immediately above, and in the event the same is denied by the Court, that the Court conclude whether the defendants are entitled to judgment by reason of the initial permission given to defendant Callahan, or by reason of actual permission to Callahan to use the insured automobile at the time and place of the collision in question, or by reason of implied permission to Callahan to use the insured automobile at the time and place of the collision in question.

Request for Hearing

Plaintiff respectfully requests the Court to fix a date and time for the hearing of the matters con-

tained herein and to advise respective counsel thereof.

Memorandum of Authorities

The foregoing objections and requests are made pursuant to Rule 52(b) Federal Rules of Civil Procedure and also to Rule 21 Rules of Practice, United States District Court for the District of Arizona.

MOORE & ROMLEY,

By /s/ JARRILL F. KAPLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed March 6, 1959.

[Title of District Court and Cause.]

MINUTE ENTRY OF THURSDAY,
APRIL 23, 1959

Honorable Dave W. Ling, United States District
Judge, Presiding.

It Is Ordered that the Proposed Findings of Fact and Conclusions of Law, submitted by defendants Harold L. Smith, Ruth M. Smith and Ronald M. Smith, are approved and adopted as the Findings of Fact and Conclusions of Law herein.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled and numbered cause came on regularly to be heard on the complaint of the plaintiff and the answer and counterclaim of certain of the defendants on the 12th day of November, 1958, before the court sitting without a jury. The plaintiff appeared in person and through its attorneys, Moore & Romley, by Mr. Jarril F. Kaplan; the defendants Roscoe B. Smith and Ida Smith appeared through their attorneys, Gorodesky, Mitchell & Stuart; and the defendants Harold L. Smith, Ruth M. Smith and Ronald M. Smith appeared through their attorneys, Scott, Cavness & Yankee and Thomas J. Croaff. Evidence was presented in support of the respective claims of the parties and all of the parties rested. The cause was taken under advisement by the court. Memoranda were filed by the parties and the cause duly submitted for decision. The court having considered the law and the evidence, and being duly advised in the premises, now finds the following:

Findings of Fact

1. The plaintiff is a corporation duly organized and existing under the laws of the State of Maryland, and is authorized to transact business as a liability insurer within the State of Arizona. The defendants Roscoe B. Smith and Ida Smith, his

wife; Harold L. Smith, Ruth M. Smith, his wife, and Ronald M. Smith are citizens and residents of the State of Arizona. The defendant Ronald G. Callahan is a citizen and resident of the State of California.

2. The amount in controversy herein exceeds the sum of Ten Thousand Dollars (\$10,000.00), exclusive of interest and costs.

3. On the 8th day of March, 1957, the plaintiff, United States Fidelity and Guaranty Company, a corporation, issued and delivered to the defendants Roscoe B. Smith and Ida Smith, his wife, a comprehensive general automobile liability insurance policy, No. CLP 38913, which policy was by its terms effective for a period of one year commencing March 8, 1957.

4. The policy described in Paragraph 3 hereof covered the operation within the terms of such policy of a 1950 Willys station wagon, bearing motor or serial No. P 14709.

5. The described policy of insurance afforded liability insurance coverage to the named insureds and, in addition thereto, to any person using the insured vehicle with the permission of the insureds.

6. On March 28, 1957, the defendant Ronald G. Callahan was driving the insured automobile with the permission of the insureds, and said automobile was during the operation thereof by Ronald G. Callahan involved in an accident in which the defendant Ronald M. Smith sustained bodily injuries.

Conclusions of Law

From the foregoing findings, the court concludes:

1. Jurisdiction of this action is conferred upon the District Court for the District of Arizona by virtue of the provisions of Title 28, U.S.C. Sec. 2201.

2. At the time of the accident described in the Findings of Fact, the policy of insurance therein described was in full force and effect and extended coverage to the defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan for any liability arising out of the operation of said vehicle and the described accident.

Let Judgment be entered accordingly.

Dated this 23rd day of April, 1959.

/s/ DAVE W. LING,

Judge of the District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed April 23, 1959.

In the District Court of the United States
For the District of Arizona

No. Civ. 2675—Phx.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Plaintiff,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
d/b/a SWAN CLEANERS, RONALD G.
CALLAHAN, a Minor, HAROLD L. SMITH
and RUTH M. SMITH, His Wife, RONALD
M. SMITH, a Minor; JOHN DOE, JANE
DOE and BLACK CORPORATION,

Defendants.

JUDGMENT

The above-entitled and numbered cause came on regularly to be heard on the complaint of the plaintiff and the answer and counterclaim of certain of the defendants on the 12th day of November, 1958, before the court sitting without a jury. The plaintiff appeared in person and through its attorneys, Moore & Romley, by Mr. Jarril F. Kaplan; the defendants Roscoe B. Smith and Ida Smith appeared through their attorneys, Gorodezky, Mitchell & Stuart; and the defendants Harold L. Smith, Ruth M. Smith and Ronald M. Smith appeared through their attorneys, Scott, Cavness & Yankee and Thomas J. Croaff. Evidence was presented in support of the respective claims of the parties, and

all of the parties rested. The cause was taken under advisement by the court. Memoranda were filed by the parties and the cause duly submitted for decision. The court having considered the law and the evidence, and being duly advised in the premises, and having made findings of fact and conclusions of law, now, therefore:

It Is Ordered, Adjudged and Decreed that judgment be entered in favor of the defendants Harold L. Smith, Ruth M. Smith, Ronald M. Smith, and Ronald G. Callahan, as follows:

1. That the plaintiff take nothing by its complaint, and that said complaint be dismissed.

2. That at the time of the accident described in the Findings of Fact, the policy of insurance therein described was in full force and effect and extended coverage to the defendants Roscoe B. Smith, Ida Smith and Ronald G. Callahan for any liability arising out of the operation of said vehicle and the described accident.

3. That the defendants have and recover their costs incurred herein.

Settled and approved this 23rd day of April, 1959.

/s/ DAVE W. LING,

Judge of the District Court.

Receipt of copy acknowledged.

Lodged March 3, 1959.

[Endorsed]: Filed and docketed April 23, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that United States Fidelity and Guaranty Company, plaintiff in the above-entitled action, appeals to the United States Court of Appeals, Ninth Circuit, from the judgment entered in said action on April 23, 1959.

Dated this 19th day of May, 1959.

MOORE & ROMLEY,

By /s/ JARRIL F. KAPLAN,
Attorneys for Plaintiff.

[Endorsed]: Filed May 19, 1959.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That United States Fidelity and Guaranty Company, as principal, and Maryland Casualty Company, as surety, are held and firmly bound, jointly and severally, unto Roscoe B. Smith and Ida Smith, his wife, Ronald G. Callahan, Harold L. Smith and Ruth M. Smith, his wife, and Ronald M. Smith, defendants and Appellees in the above-entitled cause, in the penal sum of Two Hundred Fifty Dollars

(\$250.00) lawful money of the United States of America to be paid to the above-named Appellees, for the payment of which sum well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, by these presents:

Sealed with our seals and dated this 19th day of May, 1959.

The condition of the above obligation is such that, Whereas, the above-entitled Court, on April 23, 1959, rendered judgment herein in favor of defendants and against plaintiff, and plaintiff having this day given written notice of appeal to the United States Court of Appeals, Ninth Circuit, from said judgment;

Now Therefore, if plaintiff United States Fidelity and Guaranty Company shall prosecute its appeal to effect and shall well and truly pay the costs if said appeal is dismissed or said order and judgment is affirmed, or such costs as the United States Court of Appeals, Ninth Circuit, may award if said judgment is modified, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00) then this obligation shall be null and void; otherwise to be and remain in full force and effect.

UNITED STATES FIDELITY
and GUARANTY COMPANY,

By /s/ JARRIL F. KAPLAN,
Its Attorney.

[Seal] MARYLAND CASUALTY
 COMPANY,

By /s/ JAMES M. LANDERS,
Its Attorney-In-Fact.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 19, 1959.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor, It Is Ordered that the Plaintiff's time to file the record on appeal and docket the appeal herein in the United States Court of Appeals for the Ninth Circuit, is hereby extended to and including July 20, 1959.

Dated this 26th day of June, 1959.

/s/ DAVE W. LING,
Judge, United States District Court for the District
of Arizona.

[Endorsed]: Filed June 26, 1959.

In the United States District Court
for the District of Arizona

No. Civ. 2675

U. S. FIDELITY & GUARANTY CO., a Corp.,
Plaintiff,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
etc., et al.,

Defendants.

HAROLD L. SMITH and RUTH M. SMITH, His
Wife, etc.,

Cross-Complainants and Counter-Claimants,

vs.

ROSCOE B. SMITH, IDA L. SMITH and
DANIEL CRACCHIOLO, etc.,

Cross-Defendants,

U. S. FIDELITY & GUARANTY CO., a Corp.,
Counter-Defendant.

Thursday, November 13, 1958

United States Courthouse—Phoenix, Arizona

Appearances:

MOORE & ROMLEY, by
JARRIL F. KAPLAN,

For U. S. Fidelity & Guaranty Co.

JACK CAVNESS,

THOMAS J. CROAFF, JR.,

For Harold, Ruth & Ronald Smith.

MURRAY H. STUART,

For Roscoe B. Smith and Ida Smith.

PROCEEDINGS

The Clerk: Civil 2675 Phoenix. U. S. Fidelity & Guaranty Co., a corporation, versus Roscoe B. Smith and Ida Smith, his wife, doing business as Swan Cleaners, et al., defendants. For trial.

Mr. Kaplan: Plaintiff ready.

Mr. Cavness: Defendants and Cross-Complainants Harold and Ruth Smith ready.

Mr. Stuart: Roscoe B. and Ida Smith ready.

The Court: You may proceed.

Mr. Kaplan: Before we call our first witness, I might mention, for the record, that the jurisdictional facts have been admitted, and also the fact of the issuance of the policy, and the provisions of the policy, and the existence of the accident in question.

I think first before we proceed, I should like to offer in evidence the Insurance Policy in question, which has a table on it.

The Court: It was introduced at the pretrial conference.

Mr. Kaplan: Is it already in, your Honor? It is just marked for identification.

Mr. Cavness: If it is the same one, it is all right with us.

Mr. Stuart: I have no objection. [2*]

The Court: It may be received.

The Clerk: Defendant's A in evidence.

Mr. Kaplan: You can mark it my exhibit.

The Clerk: Plaintiff's Exhibit 1 in evidence.

(Said Insurance Policy was received in evidence and marked as Plaintiff's Exhibit 1.)

Mr. Stuart: At this time, the defendant, Roscoe B. Smith, in his behalf I ask that the Court make a Memorandum of Findings of Fact and Conclusions of Law.

The Court: When? Now?

Mr. Stuart: I am just asking for findings of fact.

The Court: The Court has to under the Federal Rules. It is obligatory on the Court. The Court has to make Findings of Fact in every civil case in the Federal Court.

Mr. Stuart: All right, your Honor.

The Court: It will be done.

Mr. Cavness: You are a better federal lawyer than I am. I didn't know that. I just found it out.

The Court: All right; call your first witness.

Mr. Kaplan: I call Roscoe B. Smith. [3]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ROSCOE B. SMITH

called as a witness by the Plaintiff, U. S. Fidelity & Guaranty Co., for cross-examination, having been first duly sworn, testified as follows:

Cross-Examination

By Mr. Kaplan:

Q. Will you please state your name?

A. R. B. Smith.

Q. Where do you live, Mr. Smith?

A. 2846 North 33rd Street.

Q. What is your wife's name?

A. Ida L. Smith.

Q. What is your business or occupation?

A. Dry cleaning and laundry.

Q. How long have you been engaged in that occupation? A. In Phoenix seven years.

Q. What name do you use in connection with your business? A. Swan Cleaners.

Q. You and your wife own and operate the Swan Cleaners, is that right? A. Yes.

Q. And you use the name Swan Cleaners as your business name? A. Yes, sir. [4]

Q. How long have you operated under the name of Swan Cleaners? A. About seven years.

Q. Calling your attention, Mr. Smith, to the year 1957, and particularly the months January, February and March, did you have occasion during those months to employ your grandson, Ronald Callahan? A. Yes, sir.

Q. Do you recall when you first employed Callahan? A. I believe it was in January.

(Testimony of Roscoe B. Smith.)

Q. January of 1957? A. Yes, sir.

Q. Callahan's home, I believe, is in California, is that right? A. Yes, sir.

Q. He is the son of your daughter, Lois Callahan? A. Yes, sir.

Q. When you hired Ronald, you hired him as a pickup and delivery boy, is that right, sir?

A. Yes, sir.

Q. And in the course of his duties as pickup and delivery boy, he would pick up laundry and dry cleaning from your various agents?

A. Yes, sir.

Q. And then bring it to the plant? [5]

A. Yes, sir.

Q. And after the clothes were dry cleaned, or laundered, he would then return the clothes to the agents, or the customers, is that right?

A. Yes, sir.

Q. And in doing this pickup and delivery work, Ronald Callahan used a 1950 Jeep Station Wagon that you owned, is that right, sir?

A. Yes, sir.

Q. This policy which has been received in evidence as Plaintiff's Exhibit 1 for identification, Mr. Smith, this was the policy of insurance that you purchased and was applicable to that Jeep Station Wagon, is that right, sir?

Mr. Cavness: We will stipulate that that is the case.

The Court: All right.

Mr. Kaplan: Well, it is his policy, and I would

(Testimony of Roscoe B. Smith.)

like him to look it over, your Honor, and acknowledge it.

The Court: All right.

The Witness: Yes, sir.

Q. (By Mr. Kaplan): Mr. Smith, your grandson, Ronald Callahan, came to Arizona from California in January of 1957 for the purpose of going to work for you, isn't that [6] right?

A. Yes, sir.

Q. He did not live with you, did he?

A. For two or three weeks he did.

Q. Two or three weeks in January?

A. Yes, sir.

Q. And then who did he live with?

A. He lived with my son.

Q. Harold L. Smith? A. Yes, sir.

Q. One of the defendants in this action?

A. Yes, sir.

Q. And also his wife, Ruth M. Smith?

A. Yes, sir.

Q. Did he—rather, at the time Ronald Callahan went to work for you in January, and during the month of January, did your son, Harold L. Smith, work for you in your plant?

A. Not at that time.

Q. Where did he work?

A. He operated one of our stores at 4236 North 12th Street.

Q. Are you sure that he was not working in the plant at first, and then later took over that store?

(Testimony of Roscoe B. Smith.)

A. He did work at first in the plant.

Q. Was your son, Harold L. Smith, working in the plant [7] at the same time that Ronald Callahan was working there?

A. It is possible some of the time he could have been, but I don't remember.

Q. At some time, Mr. Smith, during the months of January, February, or March, I believe you told Ronald Callahan that he could take the Jeep Station Wagon home at night to be used as transportation to and from work, is that correct, sir?

A. Yes, sir.

Q. Do you recall when that occurred?

A. Not the exact date, I don't.

Q. Do you know whether it was in January, February, or March?

A. I think it was in January.

Q. You think it was in January?

A. Yes, sir.

Q. When you told Ronald Callahan that he could take the Jeep home, you told him that he could do so for the purpose of having transportation to and from work, is that correct?

A. Yes, sir.

Q. Can you tell the Court what Callahan's hours were when he worked for you?

A. They varied some. He would leave the plant some mornings at 9:00 o'clock. He would make one trip out and [8] get in before noon. Then he would leave again at 3:00, and get in possibly five or five-thirty.

Q. Would it be fair to say, Mr. Smith, that Mr.

(Testimony of Roscoe B. Smith.)

Ronald Callahan had no occasion whatsoever to be doing anything for you, or on behalf of your business, before the hour of 8:30 in the morning, and after the hour of 5:30 in the evening?

A. Sometimes he worked a little later than that if we didn't get the clothes out, sometimes.

Q. Sometimes he worked a little later than 5:30 in the evening?

A. Yes. It varies in our business.

Q. To what hour would he work when he worked late? A. I don't think later than 6:00.

Q. Would it be fair to state that Ronald Callahan at no time during the time he worked for you ever had any occasion to be on any business for you, or working for you in any way before the hours of 8:00 o'clock in the morning, and 7:30 at night? A. That is right.

Q. He never had any occasion to be doing any work for you at 6:00 o'clock in the morning, did he? A. No, sir.

Q. When you gave Ronald Callahan the Jeep and told him he could take it home for the purpose of having transportation [9] to and from work, it was your understanding with Callahan that he was to use the jeep only for that purpose, namely, going to and from work, is that right, sir?

Mr. Cavness: If the Court please, we object to what his understanding was. We want to know what they did.

The Court: Sustain the objection. Ask him what he told him.

(Testimony of Roscoe B. Smith.)

Q. (By Mr. Kaplan): Did you tell Callahan when you gave him the Jeep that he was to use the Jeep only for the purpose of going to and from work, and to run an errand to the grocery store, or to the drug store, or something like that?

Mr. Cavness: That is multifarious. That is too much.

The Court: I think the way to get to it would be to ask him what he told him.

Mr. Cavness: I think so.

Q. (By Mr. Kaplan): What did you tell him, Mr. Smith?

A. Well, I didn't tell him that he couldn't use it, or I didn't tell him he could use it after he went home, because, naturally, he wasn't living with me.

Q. Now, Mr. Smith, did you ever have any understanding through conversation with Mr. Callahan, as to the purpose for your giving him the Jeep?

Mr. Cavness: Same thing, if the Court [10] please.

The Court: Oh, yes.

Mr. Kaplan: Your Honor——

The Court: It doesn't mean anything to the Court. I want to know what people say.

Mr. Kaplan: Yes, your Honor. Maybe I can get at what was said through the use of the word "understanding," because from prior depositions in this action——

The Court: The Court wouldn't pay any atten-

(Testimony of Roscoe B. Smith.)

tion to that. The Court wants to know what he said, then the Court may arrive at an understanding.

Q. (By Mr. Kaplan): I believe you testified awhile ago, Mr. Smith, that you told Callahan he could take the Jeep home, and that he could do that for the purpose of having transportation to and from work? A. Yes, sir.

Q. Did you also tell him that he could use the Jeep for any other purpose? A. No, sir.

The Court: Did you tell him he couldn't?

The Witness: No, sir.

Q. (By Mr. Kaplan): Did you ever have any conversations with Callahan, Mr. Smith, except the ones that you have already related now in regard to what use he was or was not to make of the Jeep? [11] A. No.

Q. You and he never discussed that matter any further? A. No, sir.

Q. The only discussion you had with him was to the effect, "Callahan, I am giving you the Jeep to be used for the purpose of going back and forth to and from work to home"? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, on March 28th, 1957, Ronald Callahan was involved in an automobile accident. Mr. Smith, are you familiar with that accident?

A. Yes, sir.

Q. Where did the accident take place?

A. East of Mesa.

Mr. Cavness: I don't know whether counsel

(Testimony of Roscoe B. Smith.)

wants to know what he has heard, or perhaps would indicate in the record has been told to him.

Mr. Kaplan: I have got the man under cross-examination.

Mr. Cavness: If the Court please, I would like to have the witness instructed to only answer on his personal knowledge, unless Mr. Kaplan says, "I want to know what you have heard," if the man doesn't know anything about the [12] accident. He wasn't there.

Mr. Kaplan: I wasn't going to ask him about the accident, except he knew it happened.

Mr. Cavness: That is what you said, where it happened.

The Court: Go ahead.

Q. (By Mr. Kaplan): Now, Mr. Smith, did you have conversations about this accident with your son, Harold L. Smith, your daughter-in-law, Ruth Smith, Ronald Callahan, Michael Smith, the other defendants in this case?

A. After the accident?

Q. Yes. A. Not very much.

Q. Did you talk to him at all about it?

A. Some, yes, sir.

Q. And also with Ronald Callahan?

Mr. Cavness: I'm not trying to be technical. We don't care if it is hearsay, if it doesn't appear as something that the witness is supposed to know, that's all.

Q. (By Mr. Kaplan): Mr. Smith, did you get this information about this accident from the other

(Testimony of Roscoe B. Smith.)

defendants in this case, Harold Smith, Ruth Smith, Ronald Smith and Ronald Callahan?

A. Can I do some explaining, sir? [13]

Q. Go ahead.

The Court: Yes, go ahead.

The Witness: Well, in a time like that, when they have an accident and they are thrown in a hospital, you don't ask important questions as to how it happened.

Q. (By Mr. Kaplan): Mr. Smith, all I am asking you is did you discuss the accident with your family? A. Not very much.

Q. Did you discuss it with them at all?

A. Some.

Q. All right. Tell us what the discussion was, sir.

A. Well, I was trying to find out how it happened.

Q. What did you find out?

A. I found out that he went to sleep driving, and ran into an abutment of some kind, or a post.

Q. Did you find out where the accident happened? A. East of Mesa.

Q. Did you find out when the accident happened?

A. Early in the morning, around 6:00, 6:30, something like that.

Q. Did you find out what the boys were doing at that time in the morning east of Mesa?

A. No, sir.

Q. Did you find out that Michael Smith was

(Testimony of Roscoe B. Smith.)

in the Jeep with your grandson, Callahan, at the time of the accident? [14] A. Yes, sir.

Q. You don't know what the boys were doing there? A. No, sir.

Q. And you haven't heard? A. I heard.

Mr. Cavness: If the Court please, what he heard is immaterial anyway.

Mr. Kaplan: Not if he heard it from the family. They are parties——

Mr. Cavness: Oh, no.

The Court: If he heard it from Callahan.

Mr. Cavness: We are going to tell them what they were doing. We're not trying to withhold anything.

The Court: I guess we will hear.

Mr. Cavness: Yes; you will hear.

Q. (By Mr. Kaplan): Mr. Smith, let me ask you this: At the time of the accident in question, was Callahan authorized to use your Jeep truck?

A. Not that trip.

Q. And he had no permission to use it at that time? A. No.

Mr. Cavness: Just a moment, if the Court please. Permission is an express or implied thing. I don't know which Mr. Kaplan is talking about. We object. [15]

Mr. Kaplan: The man is a defendant in this case. He is a party opponent.

Mr. Cavness: It is a very material thing.

The Court: The Court will construe the contract.

(Testimony of Roscoe B. Smith.)

Mr. Cavness: But the question construes it. He can ask, Did you give him express permission.

The Court: He answered that. He said No.

Mr. Cavness: He did not. Permission is a broad thing.

Q. (By Mr. Kaplan): I believe you answered the question "No," is that right? A. Yes.

The Court: That's what he said.

Mr. Cavness: That's what he said.

Q. (By Mr. Kaplan): Mr. Smith, did Mr. Callahan at the time of this accident have any occasion whatsoever to be in that area at that time, as part of his work for you? A. No, sir.

Q. Prior to the accident of March 28, 1958, Mr. Smith, had Ronald Callahan, to your knowledge, ever used that Jeep station wagon for any purpose other than to go back and forth to and from work?

A. Some, that I know of.

Q. I believe you knew of two occasions when he did that, is that right, sir? [16]

A. Two, when he stayed with me.

Q. On one occasion—well, on these occasions when he was staying with you, and he used the Jeep for these other purposes, you gave him permission to do so, is that right, sir?

A. Yes, sir.

Q. And I believe that on one occasion Mr. Callahan without your permission took the truck and went to California? A. Yes, sir.

Q. He wasn't staying with you at that time?

A. No, sir.

(Testimony of Roscoe B. Smith.)

Q. At that time he was staying with your son, Harold L. Smith? A. Yes, sir.

Q. Now, aside from the trip to California, do you know of any occasion when Mr. Callahan ever used that Jeep without permission for any purpose other than to go back and forth to and from work?

A. I knew about it when he had the accident.

Q. Aside from that, sir?

A. Well, since he wasn't staying with me, I don't know how much he used it.

Q. Then your answer to my question is you don't know of any such occasion, is that right, sir?

A. Not exactly. [17]

The Court: What do you mean by "not exactly"?

The Witness: Well, they would go to the drug-store, grocery store, or something. Of course, he was staying with my son, you see. I wouldn't see him.

The Court: All right.

Q. (By Mr. Kaplan): Now, before this accident of March 28, 1957, did you ever have any conversations with your son, Harold L. Smith as to what he was or what he was not to do in regard to letting Ronald Callahan use that jeep truck?

A. I had some conversation with him.

Q. You told your son, Harold Smith, that he was to see to it that before Ronald Callahan took that Jeep truck out in the evening to run around,

(Testimony of Roscoe B. Smith.)

he was to first get Harold's permission, isn't that right, sir?

A. Yes, sir; except go to the grocery store.

Q. Except when he was going on an errand?

A. Yes, sir.

Mr. Kaplan: No further questions.

Cross-Examination

By Mr. Cavness:

Q. Mr. Smith, you did not tell this kid he could not use the truck, did you?

A. No, sir. [18]

Q. You didn't tell him anything. You just turned the truck over to him, and he knew what he had to do with it at work, isn't that right?

A. Yes, sir.

Q. And you didn't say anything about what he might do with it afterward, is that right?

A. No, sir.

Q. You knew he went to California, didn't you?

A. I did afterward.

Q. Afterward. You didn't give him permission to go, did you, Mr. Smith?

A. No.

Q. And you didn't reprimand him when he came back for using the truck, did you?

A. No, sir.

Q. As a matter of fact, he brought a daughter of yours back, I believe, did he not?

A. Yes, sir.

(Testimony of Roscoe B. Smith.)

Q. The gasoline was bought at the Signal Service at 6th Street and VanBuren, is that right?

A. Yes; we trade there.

Q. He had the unrestricted right to buy gasoline and other products there, is that right?

A. Yes, sir; for the truck.

Q. Yes; for the truck. I don't mean for anything else. [19] You didn't ever tell him that he could not buy gasoline there? A. No, sir.

Q. As a matter of fact, you knew your bills were running a little higher on that truck than they should run just for ordinary pickup and delivery work that he was doing, didn't you?

A. They ran pretty high.

Q. And you knew therefore that he must be using the truck on the side to go to the show, or wherever he wanted to, didn't you?

Mr. Kaplan: Just a minute, if the Court please. Because of the gas bills——

The Court: Go ahead.

Q. (By Mr. Cavness): Mr. Smith, you know what the ordinary gasoline bill runs, don't you?

A. Yes.

Q. You have been in business for quite some time. You knew these bills were running higher than that which would have been necessary to pick up and deliver laundry and cleaning, didn't you?

A. Yes, sir, but I didn't know for which trucks.

Q. You knew Ronald Callahan signed his own checks, didn't you? [20]

A. Yes, sir, but I didn't know for which trucks.

(Testimony of Roscoe B. Smith.)

Q. You knew Ronald Callahan signed his own checks, didn't you? A. Yes, sir.

Q. You knew his were running higher, didn't you? You knew that, didn't you? A. Yes.

Q. And you never said an adverse word to the kid, did you? A. No, sir.

Q. You didn't say, "You can't use the truck"?

A. No; I didn't.

Q. No; never did. In addition to the time that he went to California, Mr. Smith, you knew that he had used the truck here in town, didn't you?

A. I knew he did some.

Q. Well, as a matter of fact, your son, Bill, back here, Harold, for the record, told you that he had, didn't he? A. Yes, sir.

Q. And you never said, "Don't let that kid do this, that, or the other thing," did you, with that truck?

A. I believe I explained that awhile ago.

Q. You mean that your son was to tell him what to do? A. Yes, sir.

Q. And whatever your son told him was all right was [21] within your permission, is that right? A. That is right.

Q. And what your son told him not to do would perhaps be outside of your permission, is that right? A. Yes.

Mr. Cavness: That is all.

(Testimony of Roscoe B. Smith.)

Further Cross-Examination

By Mr. Kaplan:

Q. Are you meaning to tell the Court, Mr. Smith, that it was perfectly all right with you for Callahan to use that truck for any purpose he saw fit in the evenings to go running around? Is that what you are telling the Court?

Mr. Cavness: No; that isn't what he told the court. He didn't say that at all.

The Witness: I didn't tell the Court that.

Q. (By Mr. Kaplan): Mr. Smith, when I was asking you questions, I asked you if you knew of any occasions when Ronald Callahan ever used that Jeep for any purpose other than to go back and forth to and from work, and you said that when he was staying with you he used the Jeep on two occasions with your permission, so you knew he used it then? A. Yes.

Q. Then you mentioned the one occasion about California, taking the Jeep to California without permission? [22] A. Yes, sir.

Q. Now, sir, I will ask you, do you know of any other occasions, did you know of any other occasions before this accident, now, when Ronald Callahan used that Jeep in the evenings to go running around without permission?

A. I don't know for sure.

Q. I'm not saying what you know now, I am

(Testimony of Roscoe B. Smith.)

saying at the time of this accident, did you know then of any other occasions?

A. Not any particular occasions.

Q. Do you know of any occasions, sir, when he used the Jeep to go running around in the evening without permission from either yourself or your son, Harold?

A. No; I don't really.

Q. And you didn't at the time of the accident?

A. No, sir.

Mr. Kaplan: No further questions.

Further Examination

By Mr. Cavness:

Q. You say you don't know because you didn't see the kid do it, is that right?

A. That is right.

Q. But you had a pretty good idea he was doing it, didn't you? [23]

A. Yes, sir; I did.

Mr. Cavness: That is all.

The Court: That seems to be all, Mr. Smith.

(Witness excused.)

Mr. Kaplan: I call Ronald Callahan.

Mr. Cavness: He is not here.

Mr. Kaplan: We at this time offer in evidence the deposition of Ronald Callahan.

Mr. Cavness: We have no objection.

Mr. Stuart: No objection.

The Court: It may be received.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Said Deposition of Ronald Callahan was received in evidence and marked Plaintiff's Exhibit 2.)

Mr. Kaplan: Your Honor, I only have one additional witness. I anticipated Mr. Callahan was going to be here this morning, and that I would call him as a witness, and now that his deposition has been received in evidence, I assume the Court will want to read it at its leisure, and I have only the one additional witness. I have sent him a messenger to have him come right over, and I would like to have a short recess at this time until he gets here. It won't take but five minutes.

The Court: All right, the Court will stand at recess. [24]

(Recess.)

The Court: You may continue.

Mr. Kaplan: Your Honor, by way of Offer of Proof, before calling the next witness, we wish to avow to the Court that if the witness were permitted to answer the question which we previously asked him, he would testify, that is, Mr. R. B. Smith, that he would testify that when he turned the Jeep Station Wagon over to Callahan, it was his understanding with Callahan, and Callahan's understanding also, that he was to use the Jeep only for the purpose of going to and from work, and for the purpose of running errands, but that he was not to use the Jeep for the purpose of running around.

Mr. Cavness: We will not accept the offer of proof at all. It is not correct.

Mr. Kaplan: I will avow to the Court that he would so testify on the basis of previous depositions taken in this action.

I call Mr. Harold Johnson. [25]

HAROLD J. JOHNSON

called as a witness in behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Kaplan:

Q. Will you state your name, please?

A. Harold J. Johnson.

Q. What is your address and occupation?

A. I live at Mesa, Arizona. I am with the Arizona State Highway Patrol.

Q. Mr. Johnson, in your capacity as a Highway Patrolman, did you have occasion to investigate an accident which occurred on March 28, 1957, involving a Jeep Station Wagon? A. I did.

Q. How many cars were involved in that accident, Officer?

A. There was one car, a 1950 Jeep Station Wagon.

Q. Who was driving the station wagon at the time of the accident, according to your investigation, if you know?

Mr. Cavness: If you know.

The Witness: All I know is what I was told.

Q. (By Mr. Kaplan): All right, sir, we will skip that for a moment, and get back to that later.

(Testimony of Harold J. Johnson.)

Do you recall what time you arrived at the [26] scene of the accident?

A. Approximately 6:40 a.m.

Q. And how many people were in the Jeep Station Wagon at the time? A. Two.

Q. And what were their names?

A. Ronald Gene Callahan and Mike Ronald Smith.

Q. Did you take the boys out of the station wagon? A. I assisted, yes.

Q. You assisted in taking them out?

A. Yes.

Q. Do you know which one of them was behind the wheel?

A. Well, the vehicle was upside down. They weren't behind the wheel.

Q. I see. Where were the boys taken when they were taken out of the Jeep?

A. They were taken to the South Side Hospital at Mesa, Arizona.

Q. Where did the accident happen with regard to Mesa, Officer?

A. It happened at Mile Post 182.4. At that time it was considered about two and a quarter miles east of Mesa. However, at this time it is in the city limits.

Q. Officer Johnson, during the course of your investigation, did you have occasion to talk to Ronald Michael Smith [27] and Ronald Callahan?

A. Yes; I did.

Q. When did you talk to them?

(Testimony of Harold J. Johnson.)

A. The first real conversation I had with them was at the hospital.

Q. And when was that?

A. That was shortly after. I completed my investigation at the scene.

Q. The same day as the accident?

A. Yes, it was.

Q. Did you have occasion after that to have any further conversations with the boys in the hospital in Mesa?

A. Yes. I stopped by on two or three occasions to visit the boys at the hospital, and to check their condition.

Q. And did you have conversations with them about the accident, and what they were doing at the time during those visits to the hospital later?

A. Yes; I did.

Q. Officer, do you recall who, if anyone else, was present at the time of your conversations with Callahan?

A. No. I wouldn't be able to say for sure who was present at the time I had the conversations. I believe the mother of Mike Smith was there on some occasions. Whether or not she was in the same room when I talked to Callahan, I don't recall. [28]

And there was nurses there on different occasions, but I don't know just who they were.

Q. Did all of these conversations take place within two or three or four days after the accident?

(Testimony of Harold J. Johnson.)

A. Within a period of five or six days, a week, yes, sir.

Q. Now, Officer, will you please tell the Court what Callahan told you as to what the boys were doing at the time of the accident?

Mr. Cavness: If the Court please, insofar as the defendants whom we represent are concerned, we object to this as being hearsay.

The Court: Overruled.

The Witness: State that again, please.

Q. (By Mr. Kaplan): Tell the Court what Ronald Callahan told you in regard to what he and his cousin, Mike Smith, were doing at the time of the accident?

A. Yes. He stated he was the driver of the vehicle, and that they were running away from home, and that he had went east of Mesa some distance out towards Superior and turned around, and was starting back, and that he was very much scared because he had taken the car without permission of his grandfather.

Q. And the accident happened at the place you have already indicated? A. Yes, sir. [29]

Mr. Kaplan: No further questions.

Mr. Cavness: No questions.

Mr. Stuart: I have no questions, your Honor.

The Court: That will be all.

(Witness excused.)

Mr. Kaplan: The plaintiff rests.

Mr. Cavness: If the Court please, at this time

the defendants, Harold Smith, Ruth Smith and Ronald M. Smith, move for judgment in their favor and against the plaintiff.

The Court: I will reserve ruling on that.

Mr. Cavness: May we have, and I hate to irritate the Court, but may we have a five-minute recess.

The Court: All right, we will have five minutes.

(Recess.)

The Court: You may continue.

Mr. Cavness: I would like to call Harold Smith, please.

HAROLD L. SMITH

called as a witness in behalf of the Defendants, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Cavness:

Q. Would you state your name, please?

A. Harold Smith. [30]

Q. Where do you live? A. Mesa.

Q. You are the father of, or the stepfather of Mike Smith, is that right? A. Yes.

Q. Ronald Callahan is a nephew of yours, is that right? A. That is right.

Q. He lived with you and your family for a period of time in 1957? A. Yes, sir.

Q. How long was that, do you recall?

A. Oh, about three months.

Q. During that period of time he was working for your Dad, I believe, is that right?

(Testimony of Harold L. Smith.)

A. That is right.

Q. And that is Roscoe B. Smith? A. Yes.

Q. You worked for your father as well, I believe? A. Yes; I did.

Q. You ran an agency, or some such?

A. Yes.

Q. This kid had—when I say this kid, I mean Ronald Callahan, he had a Willys Station Wagon that he used in his work, is that right?

A. Yes. [31]

Q. Did he drive it home? A. Yes.

Q. Did he drive it in the evenings for purposes other than his work? A. Yes.

Q. Did you know about that? A. Yes.

Q. Did you tell him that he could not do so?

A. No.

Q. How did he treat that car?

Mr. Kaplan: I object to that, if the Court please, upon the grounds it is immaterial as far as this case is concerned. Unless the grandfather knew about it, it doesn't have any bearing on the issue.

Mr. Cavness: You can't put on three bricks until you put on the first brick.

The Court: Just go ahead and lay another brick.

Q. (By Mr. Cavness): How did he treat that car? A. Explain that, please.

Q. Did he ask permission of anybody, or how did he—

A. Oh, just like it was his own.

Q. Did you ever discuss that with his grandfather, about his use of the car? A. Yes.

(Testimony of Harold L. Smith.)

Q. Did his grandfather ever indicate to you that he [32] wasn't to use it except as his own?

A. Well, no, not in that sense.

Q. Did you ever tell his grandfather that this boy was using the car in the evenings as he saw fit?

Mr. Kaplan: If the Court please, Mr. Cavness is doing all the testifying.

Mr. Cavness: That is leading, and I will withdraw it. I'm sorry.

Mr. Kaplan: What question have you asked that wasn't?

Q. (By Mr. Cavness): Did you ever have a conversation with his grandfather about the use that the boy was making of this car?

A. Yes.

Q. Will you tell us when that was?

A. Not the exact dates.

Q. Approximately.

A. Oh, in January and February.

Q. Do you recall who was present, if anybody, at the time when you had this conversation with him?

A. No, sir; I don't.

Q. Would you now relate the conversation, that is, the substance of it, as best you can remember?

A. I told him that the boy was using the vehicle for his own use. [33]

Q. What was your father's response to that?

A. Oh, he didn't like it.

Q. He didn't like it. What did he say?

A. I don't remember.

(Testimony of Harold L. Smith.)

Q. Was he worried about the gasoline he might be using? A. Oh, yes.

Q. Did he tell you at that time not to allow him to use it? A. No, sir.

Mr. Cavness: That is all.

Cross-Examination

By Mr. Kaplan:

Q. Mr. Smith, if you don't remember what your father said, how do you know he didn't tell you to tell Ronald or not to permit Ronald to use the Jeep truck? A. Well, I remember orders.

Q. You remember orders? A. Yes, sir.

Q. Did you ever have any discussion with Ronald Callahan about what he was or was not to use that Jeep truck for?

A. Yes, sir; I gave him my opinion.

Q. What? A. I did; yes. [34]

Q. You gave him your opinion? A. Yes.

Q. Did you tell him that he was not supposed to use that truck for his own personal use, joy riding, and so forth? A. May I explain?

The Court: All right, answer the question.

The Witness: I told him that he should have good sense in using it if his grandfather let him.

Q. (By Mr. Kaplan): If his grandfather let him? A. Yes.

Q. Did you ever have any discussion with Ronald as to what his grandfather let him use the truck for? A. I don't remember any.

Q. And are you saying now that your father

(Testimony of Harold L. Smith.)

never asked you to supervise Callahan, and never asked you to make sure that he didn't use it for joy riding in the evenings?

Mr. Cavness: That is a multifarious question. Ask one question, but don't ask two at a time.

Mr. Kaplan: If the Court please——

The Court: Overruled. Go ahead.

Mr. Kaplan: Read the question.

(Question read.)

Mr. Cavness: If the Court please, you can see the obvious unfairness of that. This kid was living with this [35] man. Of course, he was undoubtedly asked to supervise him.

The Court: It is semantics, now.

Mr. Cavness: It is not semantics at all.

The Court: Oh, yes. Go ahead. Answer the question.

The Witness: My father did say to me he didn't want a bunch of boys running around all night in it.

Q. (By Mr. Kaplan): In the truck?

A. Yes.

Q. Including Callahan?

A. Well, he had the truck.

Q. He said that to you? A. Yes.

Q. Now, on March 27th, 1957, or March 28th in the early hours, did your son and Ronald Callahan leave home? A. Yes.

Q. When did you first discover they were gone?

A. About 6:30 in the morning.

Q. Is that when you woke up? A. Yes.

(Testimony of Harold L. Smith.)

Q. How did you know they were gone?

A. They weren't there.

Q. I mean, did you go into their room, or something, and find them gone? A. Yes. [36]

Q. Had they asked your permission before they left? A. No.

Q. Had they told you they were going?

A. No.

Mr. Kaplan: No further questions.

Mr. Stuart: No questions.

Redirect Examination

By Mr. Cavness:

Q. You were supposed to supervise this kid as a child in your home, is that right, this Callahan kid? A. Yes, because he was my nephew.

Q. And he was living with you? A. Yes.

Q. And you were the adult in charge, is that right? A. Yes.

Q. Did he use the truck in the evenings as he saw fit? A. Yes, sir.

Q. And did you advise your father of that fact?

A. Yes, sir.

Q. Were you ever told, beyond the fact of "Don't let a bunch of boys run around in that truck," were you ever told anything beyond that by your father, as to the use of that truck?

A. No, sir. [37]

Mr. Cavness: That is all.

Mr. Kaplan: No further questions.

Mr. Stuart: No questions, your Honor.

The Court: That is all.

(Witness excused.)

Mr. Cavness: That is all we have, your Honor.

The Court: Anything else?

Mr. Stuart: I would like the Court to permit me to put on testimony at some later time, as far as my attorney's fee is concerned, as alleged in my counterclaim. At the time the Court makes a decision, I will submit briefs on it, if the Court wishes.

The Court: All right.

Mr. Cavness: We will agree that that may be put on later.

The Court: Very well.

Mr. Cavness: Mr. Kaplan, is it all right with you?

Mr. Kaplan: Yes.

The Court: Now, there is nothing further?

Mr. Kaplan: We have nothing further.

Mr. Cavness: Your Honor, I would like to suggest that the law in this matter might be found in——

The Court: You just put it in a Memorandum.

Mr. Cavness: You want me to write it down?

The Court: Yes; you write it down. [38]

Mr. Kaplan: I have submitted a trial brief to the Court for the assistance of the Court.

Mr. Cavness: I haven't seen it.

Mr. Kaplan: No, because trial briefs don't have to be submitted to opposing counsel.

The Court: I am trying to find out whether you want to file an additional memorandum.

Mr. Kaplan: We can file one in more complete form, adverting to the testimony now.

Mr. Cavness: May Mr. Kaplan have ten days, and may I have ten days after that?

Mr. Kaplan: I would like to have more than that.

The Court: All right, twenty. And then you may have ten. [39]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the District of Arizona.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Phoenix, Arizona, this 21st of November, A.D. 1958.

/s/ JANE HORSWELL,
Official Reporter.

[Endorsed]: Filed December 4, 1958.

PLAINTIFF'S EXHIBIT No. 2

In the District Court of the United States
for the District of Arizona

No. Civ. 2675—Phx.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Plaintiff,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
dba Swan Cleaners; RONALD G. CALLA-
HAN, a Minor; HAROLD L. SMITH and
RUTH M. SMITH, His Wife; RONALD M.
SMITH, a Minor; JOHN DOE, JANE DOE
and BLACK CORPORATION,

Defendants.

DEPOSITION OF RONALD G. CALLAHAN
taken at 1:40 o'clock p.m., on February 25, 1958,
in the law offices of Moore & Romley, 811 First Na-
tional Bank Building, Phoenix, Arizona, before
William H. Morris, a Notary Public in and for the
County of Maricopa, State of Arizona.

The plaintiff was represented by its attorneys,
Moore & Romley, by Mr. Jarril F. Kaplan.

Defendants Roscoe B. Smith and Ida Smith were
represented by their attorneys, Gorodezky, Mitchell
& Stuart, by Mr. Eli Gorodezky.

Defendant Ronald G. Callahan was present, to-

(Deposition of Ronald G. Callahan.)

gether with his mother, Mrs. Lois Callahan, and was not represented by counsel.

Stipulation

It Is Stipulated by and between counsel for the respective parties hereto that the deposition of Ronald Callahan may be taken as an adverse party for the purposes of discovery at this time and place pursuant to notice before William H. Morris, a Notary Public in and for the County of Maricopa, State of Arizona.

It Is Further Stipulated that all objections, except as to the form of the questions propounded, are reserved until the time of trial.

It Is Further Stipulated that the reading over and signing of the deposition by the witness is waived, and notice of filing and other formalities required by law for the taking and returning of same deposition are waived. [2*]

RONALD G. CALLAHAN

called as an adverse party for cross-examination herein, being first duly sworn, testified as follows:

Cross-Examination

By Mr. Kaplan:

Q. Ronald, your full name is Ronald Callahan?

A. Yes, sir. Ronald G. Callahan.

Q. Ronald G. How old are you, Ronald?

A. 17.

Q. Where do you live? A. California.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Ronald G. Callahan.)

Q. What part? A. Lakewood.

Q. Is that near Los Angeles?

A. It is closer to Long Beach.

Q. Ronald, you were here this morning with your mother when the deposition of Mr. R. B. Smith was taken, is that correct? A. Yes.

Q. Mr. Smith is your grandfather?

A. Yes.

Q. From sitting in this morning, you know what a deposition is now? [3] A. Yes.

Q. I am going to ask you questions and you are expected to answer those questions truthfully, having in mind that you are under oath. You understand that? A. Yes; I do.

Q. Now, Ronald, my purpose here this afternoon is to find out from you the true facts of what happened concerning this accident in which you were involved on March the 28, 1957. I do not have as my purpose to trick you in any way. I am merely trying to find out from you what happened. I wasn't there. Now, if I ask you any question which you do not understand fully, please stop me and ask me to rephrase the question or restate the question. Be sure that you understand my question before you answer it. If you don't understand the question, please stop me and tell me so. I will rephrase it until you understand it. Is that all right?

A. Fine. Thank you.

Q. Ronald, you live in Lakewood with your parents, is that correct? A. Yes, sir; I do.

Q. And your parents' names are what?

(Deposition of Ronald G. Callahan.)

A. Ralph Callahan and Lois Callahan. [4]

Q. Your mother, Lois Callahan, is the daughter of Mr. R. B. Smith? A. Yes.

Q. Ronald, in January, 1957, did you have occasion to come to Arizona?

A. Yes; I did. I think—I am pretty sure it was January.

Q. And what was the purpose of your coming to Arizona at that time?

A. To work for my grandfather.

Q. Were you in school at that time?

A. No.

Q. Had you finished school?

A. No; I hadn't.

Q. Had you just decided to quit school and come to work? A. Yes.

Q. I see. Now, in January, then, you came to Arizona and went to work for your grandfather, R. B. Smith? A. That is right.

Q. In his business, Swan Cleaners?

A. Yes.

Q. And with whom did you live while you were in Arizona?

A. With my uncle and aunt. [5]

Q. And what are their names?

A. Harold Smith and Ruth Smith.

Q. Where is their home? A. Right now?

Q. Where was their home in March of 1957?

A. Gee, I don't know the address. It was on 13th Place here in Phoenix. But I don't know the address.

(Deposition of Ronald G. Callahan.)

Q. Did you have a separate bedroom all to yourself? A. No.

Q. With whom did you stay while in the Smith home? A. With my cousin.

Q. And what is his name?

A. Michael. Ronald Michael.

Q. Ronald Michael; he is commonly referred to as Mike or Michael, is that right?

A. Yes, sir.

Q. Did you sleep in the same bed or did you have twin beds in the room or what?

A. Well, it was a couch in the living room. We slept together on it.

Q. You slept together on a couch in the living room? A. Yes, sir. [6]

Q. I see, and then the Smiths, of course, had their bedroom? A. Yes.

Q. Ronald, did you have the job with your grandfather when you came here in January or did you come to Arizona to seek employment with your grandfather?

A. No. I had it before I came.

Q. You had discussed going to work with him before you came over? A. Yes.

Q. Had he been in California or had you discussed it by correspondence or do you recall?

A. Gosh, it seems like he had come back and I asked him then, but I don't know. I couldn't really say yes or no.

Q. Now, what arrangement did you make with your grandfather for working for him? That is,

(Deposition of Ronald G. Callahan.)

what hours you were to work; what you were to do; how much you were to receive or did you have any such arrangement when you first came over?

A. Well, when I first came down then, it was the agreement he was just going to teach me the business, to do the different (pause).

Q. Parts in the business?

A. Things. Yes, sir. [7]

Q. All right. There was no discussion of hours or salary or anything of that nature at that time?

A. No.

Q. When you came to Arizona, then, and did go to work for your grandfather, what job did you have?

A. Oh, whatever he could have open for me. I did the agencies for awhile, going out to Tempe and Mesa. And, oh, "bag" clothes and steam coats and just all sorts of things, learning all of it.

Q. Learning every angle of the business?

A. Yes, sir.

Q. Now, I am going to refer in my questions, Ronald, to the period of time between January in 1957 when you first went to work for your grandfather and March the 28th of 1957 when you were involved in this accident with the Jeep station wagon. A. Yes.

Q. Now, between that period of time or during that period of time, what job did you do for your grandfather or what jobs did you do?

A. Well, mostly, route, wholesale customers, agencies.

(Deposition of Ronald G. Callahan.)

Q. Agency customers? [8] A. Yes.

Q. Now, those agency customers would receive clothes from different people and would turn the clothes over to your grandfather's business for cleaning and laundry and your grandfather would return the clothes then after they had been cleaned or laundried to the agency station who would deliver the clothes to the ultimate customer, is that right? A. Yes, sir.

Q. When you say, "You did the agencies," do you mean that you picked up the clothes that needed to be cleaned and laundried from the agencies and then after they had been cleaned and laundried you delivered them back to the agencies?

A. Yes.

Q. And in the process of picking up and delivering from the agencies, if they happened to owe any money to your grandfather, would you also take the money back to the plant with you?

A. Yes. That is right.

Q. Now, where were these agencies located between January and March that you serviced?

A. You mean, the street or just here——

Q. No. Just where, generally?

A. Well, most of them was here in town. [9]

Q. Here in Phoenix?

A. Yes, sir. And there was three—there was two in Tempe and at that time one in Mesa.

Q. Who was the agent in Mesa?

A. You mean, her name?

Q. If you know.

(Deposition of Ronald G. Callahan.)

A. Her name was Van Winkle.

Q. Do you know her first name?

A. Dotty. I don't know—I think that is her nick name, but I don't know.

Q. Now, did you make pick-ups of clothes from and deliveries of clothes to Dotty Van Winkle in Mesa during the period of time, January of '57 to March 28th of '57?

A. I believe I did, yes.

Q. Do you know on how many occasions you had to make such deliveries?

A. Oh, golly. I don't remember what months it was. That's the only thing that's got me, but I went out there quite a bit. Twice a day.

Q. Did she go out of business before March 28, 1957, when you had your accident?

A. Yes; she did.

Q. Do you know how long before that she had gone out of business?

A. Oh, I imagine about two or possibly [10] four weeks.

Q. So for two or four weeks prior to the accident there were no agencies for your grandfather in Mesa?

A. No.

Q. That is correct?

A. That is right.

Q. Now, Ronald, when did you first drive the Willys Jeep station wagon which you were driving at the time of the accident?

A. You mean, the first time I ever drove it?

Q. Yes.

A. Gosh, I can't say.

(Deposition of Ronald G. Callahan.)

Q. Was it when you came over here to work for your grandfather in January?

A. That is the first time I ever drove it.

Q. I see. Now, before you ever drove the Jeep station wagon, did you ever have any discussion with your grandfather about taking the station wagon? A. No. I don't believe I did.

Q. What occasion did you have to first drive it?

A. Well, when he first started me out in the agencies, I used it first.

Q. Did you use it pursuant to your [11] grandfather's instructions? I mean, did he say, "Ronald, take the Jeep and go out and service the agencies," or what?

A. Well, at first he did, yes, and then it was just normal. I would take it and go to the agencies.

Q. That became your regular duty and you just used the truck as part of your regular duties there working for your grandfather? A. Yes.

Q. Now, what were your hours of employment during all the time you worked for your grandfather between January and March 28 of '57?

A. Oh, gosh, that would be hard to answer.

Q. Let me put it this way: You were here when your grandfather testified this morning?

A. Yes.

Q. You heard him say that it was your job to first check in with the plant or the office in the morning and then make your calls on the agencies and then come back to the plant after making your calls on the agencies; then, go back to the agencies

(Deposition of Ronald G. Callahan.)

with the cleaning and laundry after it had been serviced in the afternoon. Is that correct?

A. Yes. [12]

Q. Was your grandfather also correct when he stated that you very rarely had occasion to leave the plant before 9:00 o'clock in the morning?

A. Very rarely. That was right.

Q. That is right. Now, will you state what hours you usually arrived at the plant?

A. Oh, usually around 8:30 or sometimes 8:00, quarter till nine.

Q. Am I correct in stating that at no time did you have occasion to check into the plant before 8:00 o'clock in the morning?

A. No.

Q. That is correct?

A. That is right.

Q. At no time did you have any occasion to be working for your grandfather or doing anything for your grandfather before 8:00 o'clock in the morning?

A. That is right.

Q. Now, Ronald, do you recall how long after you began working for your grandfather that he permitted you to take the Jeep truck home at night and then drive it back to work in the morning?

A. Well, at the time I worked for him, my uncle worked at the plant, too. And I just rode [13] with him, but after he took over another agency for us, I had no way to get back and forth to work. So, then he let me take it.

Q. I see. Now, how far was it at that time from your uncle's house to the plant?

A. Well, he lived on 13th Place and it is on 32nd.

(Deposition of Ronald G. Callahan.)

Q. Street?

A. It was quite a ways. It was too far to walk.

Q. Your uncle lived on 13th Place and the plant was on 32nd Street? A. Yes.

Q. Here in Phoenix. Now, you say that when you first went to work for your grandfather in January, your uncle also worked for your grandfather at the plant? A. Yes, sir.

Q. And you living with your uncle, you naturally rode to work with him in the morning and rode back in the evenings? A. Yes, I did.

Q. Then, your uncle took over an agency for your grandfather, I think you said, and where was that agency located?

A. Well, it was on 12th Street right above [14] where he lived.

Q. Right close to where your uncle lived?

A. Close, yes.

Q. When your uncle took over the agency and no longer went back and forth to the plant, did you then ask your grandfather to let you take the truck home at night and bring it back in the morning?

A. Gosh, I don't know how I ever started taking it home. I believe he suggested I take it home.

Q. Okay. Now, when he made the suggestion, did he suggest that the purpose of your taking it home was so that you would have transportation back and forth to and from work?

A. Yes. That is right.

(Deposition of Ronald G. Callahan.)

Q. That was the only reason for letting you take the Jeep with you, is that correct?

A. Yes, sir. Back and forth.

Q. To get back and forth to work?

A. Yes.

Q. Did you understand at that time that the Jeep was not furnished to you as a personal automobile to be used by you for any personal reasons that you wanted to use it for?

A. Well, like he said: I took it for granted [15] I could go to the drug store or something like that with it.

Q. You could run errands for your uncle?

A. But not just to take it and run around town in, no. I knew that.

Q. I see. All right. Now, did you know that your grandfather had told your uncle or instructed your uncle that he was to give you permission when you wanted to use the truck for a personal reason? That is, go to a movie or take out a date or something of that nature?

A. No, sir.

Q. You didn't know it?

A. I didn't know it.

Q. Had you ever asked your uncle for permission to use the truck for any personal reasons before the accident?

A. No, not to use the truck.

Q. Well, had you ever asked his permission to use any vehicle?

A. Oh, I used his car occasionally. I asked him for that or I asked him if he minded if I went.

(Deposition of Ronald G. Callahan.)

Q. You asked him if he minded if you went some place? A. Yes. [16]

Q. On a personal errand? A. Yes.

Q. And did you mean when you asked your uncle if he minded if you went, did you mean to imply to your uncle or tell your uncle that you meant to take the Jeep station wagon when you——

A. (Interrupting): Yes. I think—it was my understanding that he knew—that is the only thing I had to take, was the Jeep.

Q. All right. Well, then, you did ask your uncle permission when you wanted to use the Jeep station wagon for a personal reason, outside of an errand for the family?

A. Well, not to use the truck, I didn't ask him.

Q. Well, what did you do?

A. Well, I would usually say, like I was going to go up to the drug store to get a magazine or something. I would say, "Do you care if I run up to the store?" I didn't say, "Can I take the truck?" I just said, "Can I go up to the drug store and get some books or something?"

Q. Well, by that, he understood that you were going to take the truck?

A. Yes; I thought so.

Q. Did you commonly ask your uncle for [17] permission to go out in the evening? Let's put it that way.

A. I very seldom ever went out in the evenings. But when I did, yes.

Q. When you did go out in the evenings, you

(Deposition of Ronald G. Callahan.)

did ask your uncle's permission? A. Yes.

Q. Now, how often did you use the Willys Jeep station wagon for purely personal reasons? That is, either to go to a movie or ride around town or go out with a bunch of the fellows or—I don't know whether you dated girls or not before the accident of March 28, 1957.

A. Well, occasionally, I would go up the street to a milkshake stand and get some milkshakes and once in a while I would go back over to the plant in the evening time.

Q. For work?

A. No. Just to see if there was something I could do. And like he said, occasionally, I did take it to a drive-in show. That is about all I ever used it for.

Q. I see. When you did take the vehicle out in the evenings, then, you did ask your uncle's permission to go wherever you were going?

A. Yes. Usually, I did. [18]

Q. And did you understand, Ronald, that either you were not to go out at all or in any event you were not to use the Jeep station wagon as a personal automobile to go wherever you wanted to go but were to use it only for the purpose of driving back and forth to and from work, unless you either had your grandfather's permission or your uncle's permission to go out?

A. Well, any time I would plan on using the Jeep for a show or something, I usually asked my grandfather if I could use it before I took it any-

(Deposition of Ronald G. Callahan.)

where. But, like if I went up to the drug store or something. He wasn't near so I could ask him, "Can I use your truck?" It was my understanding that I could use it for something like that.

Q. I see. Now, Ronald, either in the evening, late in the evening of March 27 or early in the morning of March 28, you and Michael got into the Jeep and went somewhere? A. Yes.

Q. Will you please tell me what occurred that first made you decide to take the Jeep that evening or morning, whichever it was?

A. Well, he had said that he didn't want to stay around the house. [19]

Q. Who was that? A. Mike. Michael.

Q. Did he give you any reason for that?

A. Well, he and a couple of boy friends of his, I think, were planning to run off that night. And I had had two keys to the truck all the time. They was both together, and I knew—I knew there was one missing because I couldn't find it. But I didn't—I never thought anything about it. And come to find out he had it. I don't know how he got it, but he had it.

Q. Now, Ronald, when did this conversation take place of this incident?

A. Well, the night before the wreck, I guess.

Q. The night before?

A. Well, the night when we left. I don't know what night, Monday, Tuesday, whatever night it was. Thursday, I think, and it was that night when I come home.

(Deposition of Ronald G. Callahan.)

Q. Was it late at night?

A. Yes, it was. My aunt had been down and I took her to the carnival that night.

Q. When you got home, why, Michael told you that he and some fellows were planning to run off and he didn't want to stay around the house?

A. No. He didn't tell me that. At first. [20] When I came home he was awake. Everybody else was in bed and he said something about he had to go outside and get some bicycle nuts and bolts, or something he left out on the lawn so they wouldn't rust. I thought it was funny. It was late at night and he went on out. He was out for about, oh, 20 or 30 minutes. So I went out, and I wondered what happened to him, and he was setting in the Jeep then. When he saw me come out, he got out and came around the truck and come over there where I was. I asked him what he was doing and he says, "Nothing." So, when he came in—I don't remember whether he went back to bed or what. I don't think he did. So I went out to the jeep to see if he put something in it or what. Oh, he had a little .22 rifle there, an air gun or something. I saw it laying across the front seat. I came in and I asked him about it. Then is when he told me.

Q. What did he tell you about it?

A. He told me a couple of kids and him were planning on running off that night and taking the Jeep, the truck, with them. And so I tried to talk him out of it. He said, no, he was determined to go. So, I says, "Well, why don't you just talk to

(Deposition of Ronald G. Callahan.)

Bill," my uncle, his Dad, "first about it and [21] see if you can't straighten things out, whatever is wrong?" And he said he didn't want to stay there that night. So, I said, well, I said, "We could go out and just ride around till morning and then I will call your Dad over to the agency he was running and have him meet you somewhere, and then I can go on to work and you can talk to him." So, I wrote a note. I don't remember what I said now. Something about that I told him Mike was with me and I would call him at 7:00 or 8:00, whatever it was. And I was driving around. I went out to Mesa, that way, so I turned around and was on the way back in to get to a phone. It was getting near time. I was wanting to get back in Phoenix so I could call him from there, when the accident happened.

Q. How did the accident happen?

A. I don't know.

Q. Do you recall falling asleep?

A. I think I fell asleep. That is what they told me; I fell asleep at the wheel.

Q. How long had you been riding around, Ronald?

A. Oh, gosh. I really don't know. Probably—oh, I imagine it was about 2:00, I guess, when we left. [22]

Q. 2:00 in the morning?

A. I think so. It would be hard to say because I really don't know.

Q. You had been riding around for a few hours, anyhow, when the accident happened?

(Deposition of Ronald G. Callahan.)

A. Yes. I had stopped once, though, and got coffee in Tempe and set there for a little bit.

Q. Where was Michael in the truck during this time?

A. Well, he was up with me and he says he is tired. It was cold out. So we took a blanket. I don't know what all we took, a blanket and a pillow, I think. And he took the blanket because it would be cold out and so I put my coat on. And when we was out there, he said he was going to lay down. All right. In a Jeep the seat will push forward on the rider side. So I pushed it forward and he laid down there.

Q. The only purpose you had in riding around all these hours prior to the accident and in taking the Jeep for that, was to keep Michael from running away from home with these other fellows and taking the Jeep with him, is that right?

A. Yes.

Q. You intended to keep him busy until morning, when you could get to a phone and call his [23] father and have him talk it out with his father?

A. Yes, sir. That is right.

Q. You were not, at the time you took the Jeep or at the time you were doing all this riding around prior to the accident, on any business for your grandfather, were you?

A. No. None.

Q. You knew when you took the Jeep that you were driving it around without your grandfather's or your uncle's permission?

A. Yes, that night I did.

(Deposition of Ronald G. Callahan.)

Q. That night. You knew that you were not supposed to use the Jeep for that purpose?

A. Yes; for that purpose; just to ride around in.

Q. Now, after the accident where were you taken, do you know?

A. Southside District Hospital, Mesa.

Q. And were you knocked unconscious?

A. I don't remember anything about it. I think I was.

Q. When you awoke, was there anyone else in the hospital room with you?

A. Well, the first thing I remember was I thought it was a little room and everybody was asking a bunch of questions. I don't know who they [24] was asking. They was looking at me, so I presume they was asking me, but I don't remember what I told them. I imagine they was trying to find out who to call.

Q. Was any of your family present when you woke up?

A. Well, after they started—when they called them, my aunt was there from California, my mother's sister, grandfather's other daughter and my uncle, Harold Smith, and his wife was at the hospital. They wasn't with me then at the time.

Q. Do you recall when it was that you first spoke to anyone about the accident?

A. In the hospital, you mean?

Q. Yes. A. No.

Q. Do you recall who it was that you first spoke to about the accident?

(Deposition of Ronald G. Callahan.)

A. I don't believe I spoke to anybody in the hospital about it. I don't remember if I did.

Q. You don't recall your Uncle Harold or your Aunt Ruth asking you any questions about what had happened or what was going on or anything like that? A. No. I sure don't.

Q. How long were you in the hospital? [25]

A. I think, three days.

Q. Did your mother come out from California while you were in the hospital?

A. Yes. I believe they came out that night or the next day, my mother and father both.

Q. Ronald, do you recall telling either your grandfather or your aunt and your uncle or your mother or anybody what you have told me today in regard to how the accident happened and what you were doing at the time of the accident?

A. Well, I told my mother—as soon as I got back, they took me back to California. I told her right away, and I told my mother's mother back there, my grandmother, I told her.

Q. How about your grandfather here; did you ever tell him about it?

A. No. I never saw him.

Q. How about your aunt and your uncle? Did you ever tell them? A. No.

Q. Was Michael in the same room with you in the hospital? A. Yes, he was.

Q. And did he regain consciousness during the time you were in the hospital?

A. I believe he did a couple of times. [26]

(Deposition of Ronald G. Callahan.)

Q. Do you recall his having told his mother or father or your grandfather while he was in the hospital, what happened?

A. No. I don't believe he did.

Q. Do you know whether or not Michael has ever told his parents what happened?

A. Well, myself, I don't know. My uncle told me he did.

Q. Your Uncle Harold? A. Yes.

Q. When did your Uncle Harold tell you that?

A. I believe it was just yesterday, I believe, he told me.

Q. And what did your Uncle Harold tell you that Mike had told him?

A. Well, he told me that Mike told him that he was going to run off before his report card came out, but he wasn't going to run off that night.

Q. What did Mike tell him as to why you all were out driving around?

A. I don't know. He didn't tell me that.

Q. I see. Did Mike ever mention anything to you about having trouble in school with his report card or anything like that?

A. I don't believe he did, no. [27]

Q. He didn't tell you why he and these other fellows were planning to run off?

A. Well, are you speaking about that night?

Q. Yes.

A. Well, he said that he didn't like it, and I don't believe he ever mentioned about these other fellows, why they was going.

(Deposition of Ronald G. Callahan.)

Q. He just didn't want to stay around home?

A. Yes.

Q. And because Michael was fidgety and nervous and about to run off, you decided that the best thing to do was to keep him otherwise occupied and ride him around and see if you could get him calmed down, is that right?

A. Yes. I didn't want him to take the Jeep and go out and get killed in it.

Q. And I think you previously said that you noticed that evening, that one of the keys to the Jeep was missing?

A. No. I had noticed it earlier.

Q. You had noticed that earlier?

A. Yes. But, I mean—oh, about a week before, I think. I can't be sure of that. But I didn't think too much about it. I just figured I lost it.

Q. When did you find out that Mike had the [28] other key?

A. Well, I didn't really know he had it. But, when I saw he had put a little gun in the car, I just started putting two and two together and I asked him and he did.

Q. In other words, the night before you and Michael took the truck and went out riding, that was when you discovered that he had the other key?

A. No. It was the night we left, or morning, or whenever it was.

Q. Yes; the night of the morning?

A. Yes. That same time, yes.

(Deposition of Ronald G. Callahan.)

Q. And he was intending to use that key to take the Jeep and run off?

A. That is what he said.

Q. Now, again, just so that this is absolutely clear: You were not at the time of the accident on any business of any kind for your grandfather? That is correct? A. That is correct.

Q. And you did not have permission to use the truck at that time——

A. (Interrupting): No.

Q. (Continuing): ——or place?

A. He didn't tell me to take it.

Q. You knew, that before using the truck at [29] that time and place and in the manner in which you did that evening, you were supposed to get either your grandfather's permission or your uncle's permission, is that correct?

A. To use the truck, you mean?

Q. Yes.

A. I didn't know I was to have his permission to use the truck.

Q. I mean, you knew that before taking the Jeep truck with Mike and going out that evening, riding around, going over to Mesa the way you did, that before doing that you were either supposed to have your grandfather's permission or your uncle's permission? A. Yes.

Q. And then you knew that you were using the Jeep at that time totally without permission?

A. Yes, sir. I did.

Mr. Kaplan: I have no further questions.

(Deposition of Ronald G. Callahan.)

Cross-Examination

By Mr. Gorodezky:

Q. Ronald, do you know whether Mike had had any difficulty at home, a spanking or a little trouble; something that might make him feel like running off? Do you know of anything of that [30] nature that might prompt him to want to run off?

A. Oh, my gosh. I couldn't answer that.

Q. Okay. You don't know whether he had a spanking or whether or not he was threatened or going to get a spanking or didn't get down to work for school or anything like that that prompted his feeling?

A. No. I believe he said he was afraid of his report card. I believe that is what he said.

Mr. Gorodezky: That is all, sir. Thank you.

(Signature waived.)

[Endorsed]: Filed February 28, 1958. [31]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss:

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records of

said Court, including the records in the case of United States Fidelity and Guaranty Company, a corporation, Plaintiff, vs. Roscoe B. Smith and Ida Smith, his wife, d/b/a Swan Cleaners, Ronald G. Callahan, a minor, Harold L. Smith and Ruth M. Smith, his wife, Ronald M. Smith, a minor, and Dan Cracchiolo, guardian ad litem of Ronald Callahan, a minor, numbered Civ-2675 Phoenix, on the docket of said Court.

I further certify that the attached original documents bearing the endorsements of filing thereon are the originals of said documents filed in said case, and that the attached copies of minute and civil docket entries are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that said documents, together with the original exhibits transmitted herewith, constitute the record on appeal in said case as designated, and the same are as follows, to wit:

1. Complaint.
2. Answer of Defendants Roscoe B. Smith and Ida Smith, d/b/a Swan Cleaners; Harold L. Smith and Ruth M. Smith, and Ronald M. Smith.
3. Answer of defendant Ronald G. Callahan.
4. Stipulation, Consent and Order Appointing Guardian Ad Litem.
5. Motion to Withdraw of Wm. P. Lutfy and Notice Thereof.

6. Minute entry of January 6, 1958, (order allowing counsel to withdraw).

7. Deposition of Ronald G. Callahan (Plaintiff's Exhibit No. 2 in evidence).

8. Deposition of Roscoe B. Smith, filed February 28, 1958.

9. Minute entry of March 21, 1958 (pretrial conference).

10. Counterclaim of Defendants Roscoe B. Smith and Ida Smith.

11. Plaintiff's Reply to Counterclaim of Roscoe B. Smith and Ida Smith.

12. Stipulation and Order of September 17, 1958.

13. Counterclaim of Defendants Harold L. Smith, Ruth M. Smith and Ronald G. Smith.

14. Deposition of Roscoe B. Smith, filed November 7, 1958.

15. Minute entry of November 12, 1958, (proceedings of trial).

16. Plaintiff's Reply to Counterclaim of Harold L. Smith, et al.

17. Reporter's Transcript of Proceedings.

18. Minute entry of February 27, 1959, (order for judgment).

19. Defendants' Proposed Findings of Fact and Conclusions of Law (being the same document as described under item 22 below).

20. Plaintiff's Objections to Proposed Findings of Fact and Conclusions of Law, Request for Additional Findings and Conclusions, and Request for Hearing.

21. Minute entry of April 23, 1959, (order on findings).
22. Findings of Fact and Conclusions of Law.
23. Judgment, entered, filed and docketed April 23, 1959.
24. Notice of Appeal.
25. Cost Bond on Appeal.
26. Designation of Record on Appeal.
27. Order Extending Time to File Record on Appeal and Docket Appeal.
28. Civil Docket Entries.

I further certify that all original exhibits are transmitted herewith as a part of this record on appeal, to wit:

Plaintiff's Exhibit No. 1 in evidence (Insurance Policy).

Plaintiff's Exhibit No. 2 in evidence (Deposition of Ronald G. Callahan).

Witness my hand and the seal of said Court this 3rd day of July, 1959.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

In the United States Court of Appeals
For the Ninth Circuit

Case No. 16536

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,

Appellant,

vs.

ROSCOE B. SMITH and IDA SMITH, His Wife,
d/b/a/ SWAN CLEANERS, RONALD G.
CALLAHAN, a Minor, HAROLD L. SMITH
and RUTH M. SMITH, His Wife, and RON-
ALD M. SMITH, a Minor,

Appellees.

STATEMENT OF POINTS ON APPEAL

The Points upon which Appellant intends to rely on this Appeal are as follows:

1. Finding of Fact Numbered 5 is erroneous in that it fails accurately to state the provisions of the insurance policy in question which are set forth in Plaintiff's Exhibit No. 1 in evidence.

2. Finding of Fact Numbered 6 is contrary to the undisputed facts, is a conclusion of law and is erroneous in that there is no sufficient evidence to support said finding, and it constitutes an unwarranted extension of the terms of the insurance agreement.

3. Conclusion of Law Numbered 2 is contrary to law, is not supported by the facts or the evidence and is insufficient to sustain the judgment.

4. The Judgment is not justified by the facts or the evidence and is contrary to law.

Dated at Phoenix, Arizona, this 11th day of July, 1959.

MOORE & ROMLEY,

By /s/ JARRIL F. KAPLAN,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 14, 1959.

[Endorsed]: No. 16536. United States Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company, a Corporation, Appellant, vs. Roscoe B. Smith and Ida Smith, Ronald G. Callahan, Harold L. Smith and Ruth Smith, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed July 6, 1959.

Docketed: July 14, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 16536

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation,

Appellant,

vs.

ROSCOE B. SMITH and IDA SMITH, RONALD
G. CALLAHAN, HAROLD L. SMITH, RUTH
SMITH and RONALD M. SMITH,

Appellees.

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona

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Attorneys for Appellant

FILED

NOV 16 1959

PAUL P. O'BRIEN, CLERK

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No. 16536

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a Corporation,

Appellant,

vs.

ROSCOE B. SMITH and IDA SMITH, RONALD
G. CALLAHAN, HAROLD L. SMITH, RUTH
SMITH and RONALD M. SMITH,

Appellees.

Appellant's Opening Brief

Appeal from the United States District Court
for the District of Arizona

JURISDICTION

The jurisdiction of the District Court was invoked under Act June 25, 1948, c. 646, 62 Stat. 930; 28 U.S.C.A. § 1332. Appellant United States Fidelity and Guaranty Company, a Maryland corporation, commenced this action, alleging that Appellee-defendants Roscoe B. Smith, Ida Smith, Harold L. Smith, Ruth M. Smith and Ronald M. Smith are citizens and residents of the State of Arizona, that Appellee-defendant Ronald G. Callahan is a citizen and resident of the State of California, and that the amount in controversy

exceeds the sum of \$3,000.00, exclusive of interest and costs.¹

The jurisdictional allegations were admitted by Appellees² and confirmed by the Findings of Fact of the District Court.³ Final judgment of the District Court was entered on April 23, 1959.⁴ Appellant's Notice of Appeal was filed on May 19, 1959.⁵ The jurisdiction of this Court is invoked under Act June 25, 1948, c. 646, 62 Stat. 929; as amended October 31, 1951, c. 655, § 48, 65 Stat. 726; and as amended July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

Appellant commenced this action to obtain a judgment declaring that Appellee Ronald G. Callahan was not insured by Appellant at the time and place of an accident which occurred on March 28, 1957.⁶ The District Court concluded that Callahan was insured and entered judgment in favor of Appellees.

The issue presented is whether the actual use of the insured automobile by Appellee Ronald G. Callahan at the time and place of the accident was with the permission of Appellee Roscoe B. Smith, the insured-owner. The questions presented are:

1. Tr. 3-4. References to the printed Transcript of Record are designated as "Tr.".

2. Tr. 9, 11.

3. Tr. 25-26. The District Court found that the amount in controversy exceeds the sum of \$10,000.00, exclusive of interest and costs.

4. Tr. 28-29.

5. Tr. 30.

6. The complaint alleged an actual controversy between the parties. (Tr. 7) Declaratory judgment was authorized by Act June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349; 28 U.S.C.A. § 2201.

1. Whether permission can be found where the insured-owner and his bailee both concede there was no permission.

2. Whether permission can be found where the bailee uses the insured automobile at a time, at a place and for a purpose completely beyond the scope of the use contemplated by bailor and bailee when the bailment was made.

STATEMENT OF FACTS

For convenience and clarity, Appellees will sometimes be referred to by name.

Roscoe B. Smith and Ida Smith, his wife, own and operate a laundry and dry cleaning business in Phoenix, Arizona known as Swan Cleaners.⁷ On March 8, 1957 Appellant issued an insurance policy to "R. B. Smith, dba Swan Cleaners", effective until March 8, 1958.⁸ One of the automobiles insured under the policy was a Willys Station Wagon (hereinafter called the "Jeep") owned by R. B. Smith.⁹ The insurance policy contained an omnibus clause whereby the bodily injury and property damage liability insurance therein provided was made to extend not only to the named insured, but to:

"* * * any person while using an owned automobile * * * provided the actual use of the automobile is by the Named Insured or with his permission * * *."¹⁰

In January, 1957 Ronald Callahan, 17 years of age, came to Phoenix from his home in California to work for R. B. Smith, his grandfather.¹¹ He was employed as a pickup and

7. Tr. 36.

8. Plaintiff's Exhibit 1; Tr. 5, 66, 76.

9. Tr. 5, 82.

10. Tr. 66.

11. Tr. 36-37, 84, 86.

delivery boy. In the course of his pickup and delivery duties, Callahan was permitted to, and did, use the insured Jeep.¹²

For the first two or three weeks Callahan lived with his grandfather. He then went to live with Harold L. Smith and Ruth M. Smith, his uncle and aunt, and Ronald Michael Smith (hereinafter called "Michael"), his cousin. Harold Smith, R. B. Smith's son, was at first employed in his father's plant, and Callahan rode to and from work with him. Later, Harold Smith took over one of his father's agencies away from the plant.¹³ At that time R. B. Smith told Callahan to take the Jeep at night for the purpose of having transportation to and from work. They had no other conversation in regard to the use of the Jeep.¹⁴ It was understood by both parties, however, that Callahan could use the Jeep to run errands to the grocery store and drug store, but he was not to use the Jeep for joy riding.¹⁵

On one occasion prior to the accident, Harold Smith told R. B. Smith that Callahan had used the Jeep at night for personal purposes. R. B. then told Harold to see to it that before Callahan took the Jeep in the evening to run around, Callahan was to first get Harold's permission.¹⁶ Again, Callahan understood this restriction on his use of the truck for personal reasons.¹⁷

At about 2:00 o'clock on the morning of March 28, 1957, while Harold and Ruth Smith were sleeping, Callahan and his cousin Michael took the Jeep, left Phoenix and proceeded toward Superior, Arizona. Some four and a half hours later, at approximately 6:30 o'clock that morning, at

12. Tr. 37, 89, 91.

13. Tr. 92-93.

14. Tr. 39, 42, 92-94.

15. Tr. 47-48, 94.

16. Tr. 47-48, 50.

17. Tr. 94, 105.

a place about $2\frac{1}{4}$ miles east of Mesa, Arizona (18 miles from Phoenix), Callahan fell asleep at the wheel, the Jeep left the highway and overturned, and both boys were injured.¹⁸ Shortly after the accident Callahan told the investigating Arizona Highway Patrolman that:¹⁹

“* * * he was the driver of the vehicle, and that they were running away from home, and that he had went east of Mesa some distance out towards Superior and turned around, and was starting back, and that he was very much scared because he had taken the car without permission of his grandfather.”

In his deposition, received in evidence, Callahan testified that Michael Smith was going to run away from home, so Callahan decided to drive Michael around until morning when Michael's father, Harold Smith, could be consulted.²⁰ Why Callahan didn't simply awaken Harold is unexplained. In any event, Callahan told no one he was going and did not obtain permission to leave from either Harold or R. B. Smith.²¹

R. B. Smith and Callahan both admit that Callahan had no permission to use the Jeep at the time and place of the accident. Their exact testimony in this regard is as follows:

R. B. Smith:²²

“Q. (By Mr. Kaplan): Mr. Smith, let me ask you this: At the time of the accident in question, was Callahan authorized to use your Jeep truck?

A. Not that trip.

Q. And he had no permission to use it at that time?

A. No.

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18. Tr. 44, 54-55, 62-63, 98-100.

19. Tr. 57.

20. 98-100.

21. Tr. 62-63.

22. Tr. 45-46.

Q. (By Mr. Kaplan): Mr. Smith, did Mr. Callahan at the time of this accident have any occasion whatsoever to be in that area at that time, as part of his work for you?

A. No, sir."

Ronald Callahan:²³

"Q. You were not, at the time you took the Jeep or at the time you were doing all this riding around prior to the accident, on any business for your grandfather, were you?

A. No. None.

Q. You knew when you took the Jeep that you were driving it around without your grandfather's or your uncle's permission?

A. Yes, that night I did.

Q. That night. You knew that you were not supposed to use the Jeep for that purpose?

A. Yes; for that purpose; just to ride around in.

* * * * *

Q. I mean, you knew that before taking the Jeep truck with Mike and going out that evening, riding around, going over to Mesa the way you did, that before doing that you were either supposed to have your grandfather's permission or your uncle's permission?

A. Yes.

Q. And then you knew that you were using the Jeep at that time totally without permission?

A. Yes, sir. I did."

SPECIFICATIONS OF ERROR

The District Court erred:

1. In making Finding of Fact No. 5²⁴ that:

"The described policy of insurance afforded liability insurance coverage to the named insureds and, in addi-

23. 100-101, 105.

24. Tr. 26.

tion thereto, to any person using the insured vehicle with the permission of the insureds.”

for the reason that such finding is contrary to the language of the policy that the liability coverage is extended to “any person while using an owned automobile * * * provided the actual use of the automobile is by the Named Insured or with his permission.”

2. In making the following portion of Finding of Fact No. 6:²⁵

“On March 28, 1957, the defendant Ronald G. Callahan was driving the insured automobile with the permission of the insureds * * *.”

for the reason that the conclusion is not sustained by the facts, which are uncontradicted, and is contrary to law in that there is no “permission”, within the meaning of the omnibus clause of the insurance policy, where the use made of the insured automobile at the time and place of the accident deviates materially from the time, place and purpose for which such use was permitted.

3. In making that portion of Conclusion of Law No. 2,²⁶ and entering that portion of the judgment appealed from, as follows:

“At the time of the accident * * * the policy of insurance * * * extended coverage to * * * Ronald G. Callahan for any liability arising out of the operation of said vehicle and the described accident.”

for the reason that the facts do not justify such conclusion and judgment, and they are contrary to law.

25. Tr. 26.

26. Tr. 27, 29.

SUMMARY OF ARGUMENT

The omnibus clause extends liability insurance to any person using an insured automobile provided the actual use thereof is with the permission of the named insured; such persons become additional insureds under the policy.

The courts have expressed divergent views on whether the omnibus clause extends to a person whose use of the insured automobile at the time of the accident is outside the scope of the purpose for which permission was granted in the first instance.

Some courts have adopted the minority rule, or so-called "liberal rule", that when the person receives permission to use the car in the first instance, any use while it remains in his possession is with permission under the omnibus clause, even though he deviates from the use contemplated by the parties when the insured-owner parted with possession. *Dickinson v. Maryland Casualty Co.*, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924); *Stovall v. New York Indem. Co.*, 157 Tenn. 301, 8 S.W. 2d 473, 72 A.L.R. 1368 (1928).

The majority of courts, this Court included, have adopted the minor deviation rule: There is no permission within the meaning of the omnibus clause unless the car is used at a time or place, or for a purpose, contemplated when permission was originally given, or such a minor deviation from the contemplated use as to be immaterial. *Fredericksen v. Employers' Liability Assur. Corp.*, 26 F.2d 76 (C.C.A. 9 Cal., 1928); *Trotter v. Union Indem. Co.*, 35 F.2d 104 (C.C.A. 9 Wash., 1929); *Hodges v. Ocean Acc. & G. Corp.*, 66 Ga. App. 431, 18 S.E. 2d 28 (1941), cert. den. 62 S. Ct. 1299, 316 U.S. 693, 86 L. Ed. 1763 (1942), reh. den. 63 S. Ct. 25, 317 U.S. 705, 87 L. Ed. 563 (1942); *Gulla v. Reynolds*, 82 Ohio App. 243, 81 N.E. 2d 406 (1948).

The majority rule is the better-reasoned rule and the one most likely to be adopted in Arizona.

Under the majority rule, when a person is given permission to use a car to work, to go back and forth to work and to run errands, and he is involved in an accident at 6:30 in the morning, at a place some 18 miles distant from the city of intended use, and while using the car for the purpose of running away from home or joy riding, he is not an additional insured under the omnibus clause. Such use is a radical deviation from the use contemplated when permission was granted and cannot be held to be with the permission of the insured-owner.

ARGUMENT

I. The Omnibus Clause Extends Only to Persons Using the Automobile Within the Scope of the Permission Granted.

The omnibus clause extends liability insurance to persons who come within its terms and meet its requirements. Such persons become additional insureds, as if they were named in the policy.²⁷

It is clear that the omnibus clause does not extend coverage to every person using the insured's automobile. One condition especially stipulated by the omnibus clause is that the actual use of the automobile is with the permission of the named insured.

The instant case is a novel one in that there are no Arizona decisions involving the omnibus clause. Other courts have interpreted the clause in various ways. The decision in this case may very well shape the law of Arizona on this subject.

27. General discussions as to the effect of an omnibus clause are found in *Appleman, Insurance Law and Practice*, Vol. 7, Sec. 4353, p. 127; 5A *Am. Jur., Automobile Insurance*, Sec. 91, pp. 89-90; 45 *C.J.S., Insurance*, Sec. 829, pp. 894-895.

It is well-settled that the permission required may be express or implied.²⁸ Many cases turn on the question of whether there was permission, express or implied, to use the car in the first instance, that is, to use the car at all. That question is not involved here. There is no question in this case that R. B. Smith gave Ronald Callahan, his employee-grandson, permission to use the Jeep. The question is whether Callahan was using the Jeep at the time of the accident within the scope of the permission granted. It is on this question that the courts are divided.

A. The Minority Rule.

Some courts take the view that when the bailee receives express or implied permission to use the car in the first instance, any use while it remains in his possession is with permission under the omnibus clause, even though he deviates from the use contemplated by the parties when the bailor parted with possession. More succinctly stated, permission for any purpose implies permission for all purposes. This rule is sometimes called the minority rule, sometimes the liberal rule.²⁹ One distinguished authority has critically dubbed it the "hell or high water" rule.³⁰

The leading cases supporting this rule are *Dickinson v. Maryland Casualty Co.*, 101 Conn. 369, 125 A. 866, 41 A.L.R. 500 (1924), and *Stovall v. New York Indem. Co.*, 157 Tenn. 301, 8 S.W. 2d 473, 72 A.L.R. 1368 (1928).³¹

28. 5A *Am. Jur., Automobile Insurance*, Sec. 94, p. 92; *Anno.*: 5 A.L.R. 2d 608, 45 *C.J.S., Insurance*, Sec. 829, pp. 896-898.

29. *Aetna Casualty & Sur. Co. v. DeMaison*, 213 F.2d 826 (C.A. 3 Pa., 1954); *Anno.*: 5 A.L.R. 2d 622.

30. *Appleman, Insurance Law and Practice*, Vol. 7, Sec. 4366, p. 169.

31. Other states said to be in accord with this rule are Illinois, Louisiana, Massachusetts, New Jersey, Oregon and Wisconsin. *Anno.*: 5 A.L.R. 2d 624, 629.

In *Dickinson* the bailee received permission to use the car for the purpose of going home and changing his clothes, with the admonition to hurry back. Instead, the bailee went to a saloon, picked up three passengers, proceeded more than a mile directly away from his home to another drinking place, and then to a third place. Thinking it might be time to return the car, the bailee started back toward the owner's garage, intending to find out on the way if he still had time to change clothes. While on the way back, the car skidded into a tree and one of the passengers was killed. There is some doubt that *Dickinson* is authority for the minority rule. Much of the language in the opinion supports that rule. The actual holding, however, was that:

“* * * These slight deviations from the route to his home, in a swiftly moving automobile, are too unimportant to have attached to them by construction the import of annulling the protective features of this insurance policy.” 125 A. 870.

Stovall leaves no doubt. In that case the insured's employee was permitted to use the car in his business as the insured's salesman. He was specifically admonished not to use the car for his own pleasure or private purposes. On one occasion he received permission to take the car from its garage for the purpose of taking some customers to the railroad station. Thereafter the car was returned to the garage. Instead of giving the claim check to his superior, as he was supposed to, the employee kept the check and later took the car from the garage a second time. This time he proceeded to visit his fiancée' in a city many miles away. While on the way, he was involved in an accident. The Court expressly held (8 S.W. 2d 477) :

“It is our opinion that the words, ‘providing such use or operation is with the permission of the named assured,’ were intended to exclude from the protection

of the policy a person who should take the automobile and use it without permission or authority in the first instance. If, however, the automobile covered by the policy is delivered to another for use, with the permission of the owner or insured, his subsequent use of it is with the permission of the insured, within the meaning of the policy, regardless of whether the automobile is driven to a place or for a purpose not within the contemplation of the insured when he parted with possession."

The rationale of this rule is that liability insurance is for the benefit of the public as well as for the named or additional insured, and the object of the omnibus clause is to cover the liability of any operator to whom the named insured has voluntarily given possession of the car. In many cases this rationale is based upon the various statutes adopted by several states requiring owners of automobiles to carry liability insurance, the reasoning being that the legislative intent was to protect those injured by an automobile, no matter when, where or for what purpose it is driven, so long as the driver was given possession of the car for some purpose. There is no such statute in Arizona.

The minority rule can be absurd in its application. For example, it would extend coverage where the owner permits a friend to use his car for a local errand, and the friend absconds to another state intending to keep the car. The friend would at once be liable to the owner for conversion and held to have the owner's permission to use the automobile. This is an unreasonable extension of the meaning of "permission" as used in the omnibus clause. In recognition of the lack of sound reasoning behind the minority rule, Tennessee has now rejected the *Stovall* case. *Branch v. United States Fidelity and Guaranty Company*, 198 F.2d 1007 (C.A. 6 Tenn., 1952).

B. The Majority Rule.

The majority of the courts, this Court included, have rejected the rationale of the so-called liberal rule and have adopted what is known as the minor deviation rule. Under this rule express permission for a given purpose does not imply permission for all purposes. To be within the omnibus clause, the bailee must use the car at a time or place, or for a purpose, contemplated by the parties, or his use must be such a slight or minor deviation therefrom as to be immaterial.

The leading cases supporting this rule are *Fredericksen v. Employers' Liability Assur. Corp.*, 26 F.2d 76 (C.C.A. 9 Cal., 1928); *Trotter v. Union Indem. Co.*, 35 F.2d 104 (C.C.A. 9 Wash., 1929); *Hodges v. Ocean Acc. & G. Corp.*, 66 Ga. App. 431, 18 S.E. 2d 28 (1941), cert. den. 62 S. Ct. 1299, 316 U.S. 693, 86 L. Ed. 1763 (1942), reh. den. 63 S. Ct. 25, 317 U.S. 705, 87 L. Ed. 563 (1942); and *Gulla v. Reynolds*, 82 Ohio App. 243, 81 N.E. 2d 406 (1948).

In *Fredericksen* the insured gave a friend permission to use his automobile for the purpose of attending an early morning funeral in Oakland. After the funeral was over, the friend and some of his companions drove around Oakland until noon and then decided to drive to Livermore, 40 miles away. The friend attempted by telephone to obtain the insured's permission, but could not reach the insured. About midway on the return trip from Livermore, at approximately 6 o'clock in the evening, the friend was involved in an accident. This Court said (26 F.2d 77) :

"It may be conceded that slight deviations by one who has been permitted by the insured to use an automobile for a specified purpose does not destroy the insurer's liability for injuries to the driver or his guests, but that is far from saying that the permission to use an automobile to attend a funeral in the morning

in the city in which the insured resides carries with it permission to use the automobile in the afternoon for a joy ride many miles beyond the city limits."

In *Trotter* the insured furnished his car to one Hickey for use in making sales, upon commission, of certain lots near Seattle belonging to the insured. The insured also consented to use of the car by Hickey's assistants and employees in the sale of the lots, and to use of the car for pleasure by members of Hickey's family. One evening Hickey and a person named Bullock engaged in conversation regarding the possibility of the latter's employment to sell the lots, but no agreement was reached. While so engaged, they drank some liquor, and when they parted, late at night, Hickey authorized Bullock to take the insured's car and use it for Bullock's pleasure. This Court said (35 F.2d 105-106):

"If we interpret these findings in the light of the court's memorandum opinion [33 F.(2d) 363] filed at the same time, the most that can be said for appellant is that restrictions upon the use of the car were not expressed by the owner when he gave Hickey possession thereof. But, admittedly, the only object Grill had was to aid Hickey in carrying to success the business enterprise in which they were both interested. Hence a restriction to that purpose, in the absence of evidence to the contrary, is clearly implied. It might not be unreasonable to say that the owner contemplated that while the enterprise was in progress Hickey and members of his immediate family would now and then use the car for pleasure, but as suggested by the court below, to hold, in the absence of any affirmative expression of consent, that Grill contemplated or intended that Hickey would permit use by more or less intoxicated joy riders on the streets of Seattle at 4 o'clock in the morning would be against reason. Nor do we share in the view that express 'permission' for a given purpose implies permission for all purposes. * * *"

This Court expressly rejected the minority rule as stated in *Stovall v. New York Indem. Co.*, supra, 8 S.W. 2d 473.

In *Hodges* the Seaboard Loan & Savings Company furnished an automobile to C. F. Langran, its employee, for use in the company's business. Langran was also advised that he could keep the car after business hours to go back and forth to work. On a Sunday afternoon Langran took the car and used it on a personal mission, during the course of which an accident occurred. The Georgia court said (18 S.E. 2d 32):

“* * * we hold that while slight and inconsequential deviations will not annul the coverage of the omnibus clause, yet there is an absence of ‘permission,’ within the meaning of the policy, if the car is being driven at a time or place or for a purpose not authorized by the insured. In other words, the decisions of the courts, in states where no statutory regulations exist requiring liability insurance, are to the effect that permission means a consent to use the car at the time or place or for a purpose authorized by the insured, express or implied. This third element requires that the purpose for which the car is used at the time of the accident be a purpose stated or intended at the time that the bailment is made, but slight deviations are too unimportant to have attached to them by construction the import of annulling the protective features of the policy. * * *”

Gulla cites and relies upon the decisions of this Court in *Fredericksen* and *Trotter*. In *Gulla* the driver purchased a baby bed from the insured and asked permission to use the insured's truck to deliver the bed to a place a block away. Permission was granted; no instructions were given as to the use of the truck for any other purpose. Some three hours after permission was granted, beyond the area for contemplated use and beyond the scope of the purpose for which the driver was given permission, the truck and

driver were involved in an accident. The Ohio court said (81 N.E. 2d 408) :

“There are many decisions construing and applying permissive use provisions in liability insurance policies. These authorities divide into generally two doctrines. The so-called minority rule, *developed in construing the older policies, where the phraseology was ‘use with permission,’* was that where permission, express or implied, was given by the owner to use the car in the first instance, such use was covered by the policy, even though the person using the car may have put it to a use far beyond that contemplated by the owner at the time permission to use was given. * * *

* * * * *

“The other, or majority doctrine, is that permission by the owner to the use of his car by another includes only such use as was reasonably contemplated by the owner, as shown by the circumstances, and that while, even under this doctrine, a slight deviation would not necessarily exclude coverage, yet a use by the operator outside the scope of the owner’s contemplated permission excludes such use from being the permitted use within the terms of the policy.

* * * * *

“In more recent policies, and apparently to escape the so-called minority rule above referred to, the phraseology has been changed to ‘actual use’ with permission, etc. In Vol. 7, Appleman on Insurance Law and Practice, Casualty Insurance § 4354, page 132, it is stated: ‘The term “actual use”, as employed in the present policy, was drafted to confine the coverage to situations where the employment made of the vehicle at the time of the accident was within the scope of the permission granted.’

“It seems logical to this court that the term ‘actual use’ be construed as referable to the use being made of the car *at the time and place of the accident* and if that be outside the reasonable scope of the permission

granted to hold that coverage is not extended to the driver. * * *” (Italics ours.)

The principles of the minor deviation rule may be summarized as follows:

1. When an insured gives another permission to use his car for specific purposes, restrictions to those purposes is clearly implied.

2. The term “actual use” in the omnibus clause refers to the use made of the automobile at the time and place of the accident, and if that be outside the reasonable scope of the permission granted, coverage does not extend to the driver.³²

3. Permission means use of the automobile at a time or place, or for a purpose, contemplated when the bailment was made, or such a slight deviation therefrom as to be immaterial.

The minor deviation doctrine has been adopted by the majority of courts because it is the more reasonable rule, certainly the more logical.³³ It tenders a fair interpretation of the omnibus clause, an interpretation which accords with the language of the clause and is calculated to produce a

32. In accord as to meaning of “actual use”: *Laroche v. Farm Bureau Mutual Automobile Ins. Co.*, 335 Pa. 478, 7 A.2d 361 (1939); *Johnson v. Maryland Casualty Co.*, 34 F. Supp. 870 (D.C. Wis., 1940); *Liberty Mutual Ins. Co. v. Stilson*, 34 F. Supp. 885 (D.C. Minn., 1940); *Hartford Acc. & Indem. Co. v. Peach*, 193 Va. 260, 68 S.E. 2d 520 (1952); *Aetna Casualty & Sur. Co. v. DeMaison*, supra footnote 29, 213 F.2d 826. This meaning, of course, is rejected by courts applying the minority rule. *Haeuser v. Aetna Casualty & S. Co.*, 187 So. 684 (La. App., 1939).

33. It has been stated that there is a third rule, known as the “strict” or “conversion” rule, under which no deviation, however slight, is permitted. *Appleman, Insurance Law and Practice*, Vol. 7, Sees. 4366, 4367, 4368, pp. 169, 172, 178; *Anno.*: 5 A.L.R. 2d 622. Analysis of the cases, however, reveals that the courts applying the so-called strict-rule are ready to overlook minor deviations from permitted use. Accord *Anno.*: 5 A.L.R. 2d 636-637.

just result. The Arizona courts are motivated by the same consideration, and it is therefore reasonable to assume that they would adopt the majority rule.

II. A Bailee Who Materially Deviates in Time, Place and Purpose from the Use Contemplated, and Who Admittedly Had No Permission, Is Not An Additional Insured Under the Omnibus Clause.

The District Court found that at the time of the accident Callahan was driving the Jeep with the permission of R. B. Smith. Manifestly, this finding is a legal inference or conclusion from the other facts proven, and it is therefore reviewable by this Court free of the clearly-erroneous rule.³⁴ *Aetna Casualty & Sur. Co. v. DeMaison*, 213 F.2d 826 (C.A. 3 Pa., 1954). An expression of the same principle by this Court, although not as to the same finding, is contained in *Stevenot v. Norberg*, 210 F.2d 615 (C.A. 9 Cal., 1954), as follows (at page 619):

“* * * When a finding is essentially one dealing with the effect of certain transactions or events, rather than a finding which resolves disputed facts, an appellate court is not bound by the rule that findings shall not be set aside, unless clearly erroneous, but is free to draw its own conclusions.”

The undisputed facts in this case are that Callahan was given permission to use the Jeep in his work and for transportation to and from work. He knew and understood that, except for errands to the grocery or drug store, he was not to use the Jeep in the evenings for joy riding or personal reasons without the express permission of his uncle or his grandfather. On March 28, 1957 at 2 o'clock in the morning, Callahan took the Jeep and left his uncle's home with his cousin Michael for the purpose either of running

34. Rule 52(a), Federal Rules of Civil Procedure.

away from home or just plain joy riding. He did not obtain permission from either his uncle or his grandfather. At about 6:30 that morning, after riding around for some four and a half hours, the accident occurred at a place approximately 18 miles from Phoenix.

Clearly, at the time of the accident Callahan was doing something radically different from that which he was authorized to do. His use of the Jeep to run away from home or joy ride for four hours, in the early morning, several miles from Phoenix, was a material deviation from the time, place and purpose contemplated by both R. B. Smith and Callahan when permission to use the Jeep was granted. Smith and Callahan both concede that at the time and place of the accident Callahan was using the Jeep without permission. As Callahan so aptly put it to the highway patrolman shortly after the accident, Callahan "was very much scared because he had taken the car without permission of his grandfather."

The only basis for the District Court's conclusion that Callahan had permission under the omnibus clause is that Callahan was given permission to use the Jeep in the first instance. Only the minority rule justifies a conclusion that permission existed in this case. As earlier pointed out, it is reasonable to assume that the Arizona courts would adopt the majority, minor deviation rule. Under the majority rule, the facts in this case demonstrate that at the time of the accident Callahan was not using the Jeep within the scope of the permission granted.

We have searched the cases carefully to find a decision involving the situation here presented. We were unable to find one. There are several cases, however, which involve similar situations and illustrate how the majority rule has been applied.

The *Fredericksen* and *Trotter* cases decided by this Court, and described supra, at pages 9, 13-15, are excellent examples.

In *Liberty Mutual Ins. Co. v. Stilson*, 34 F. Supp. 885 (D.C. Minn., 1940), C. W. Stilson was the owner of a Buick automobile and the father of Homer Stilson. Homer lived with his father and was permitted to drive the car in and about the city of Duluth, Minnesota, their home. One day Homer requested and received his father's permission to take the car to Minneapolis for a football game. Instead, Homer proceeded with some friends to Chicago and while en route, became involved in an accident. The Court held that there was no permission under the omnibus clause in C. W. Stilson's policy and said (34 F. Supp. 887):

"The policy is to be construed in the light of the language it contains and I do not think there is any ambiguity in the language, 'provided further that the actual use is with the permission of the named insured'. This language limits the use of the automobile to a specific use permitted to be made of it at the time of the accident. If at that time permission is found to exist, coverage extends; otherwise not. * * *

"* * * Express permission for a given purpose does not imply permission for all purposes."

In *Employers Casualty Co. v. Williamson*, 179 F.2d 11 (C.A. 10 Okla., 1950), one of the named insureds permitted ~~Kelly~~^{Yarsant}, an employee, to use an insured truck for the purpose of hauling dirt in the insureds' business. ~~Kelly~~^{Yarsant} was also permitted to use the truck to haul dirt for others, dividing the compensation between himself and the insureds. On one occasion ~~Kelly~~^{Yarsant} went to pick up a load of dirt at the home of a man named Weldon. Weldon was not home, so ~~Kelly~~^{Yarsant} started back to return the truck to the insureds' place of business. On the way he met a woman who asked him to haul dirt for her and also to obtain for her a second-hand

water heater. ~~Kelly~~ *yarsant* agreed, the compensation to be split with the insureds. While on the way to the junk yard for the heater, ~~Kelly~~ *yarsant* met with an accident. The District Court found permission under the omnibus clause of the insureds' policy. In reversing the District Court, the Court of Appeals said (179 F.2d 13-14):

“Granting, for the sake of argument, that Yarsant’s permission to use the truck was a general permission to haul dirt and that, therefore, his agreement to haul dirt for this woman was within the permissive use, this would not apply to his agreement to haul a water heater. Clearly, he had no permission to use the truck for such a purpose. If that were so, it would likewise give him the right to haul a stove, a refrigerator, furniture, or groceries. To so hold would convert a permit for a limited use into one for a general use.

* * * * *

“In order to find coverage here, the record would have to sustain a finding that Yarsant had permission to do any and all kinds of hauling. There is no evidence warranting such a finding. We think the undisputed evidence requires a finding that Yarsant had no permission to use the truck to haul the water heater and that, therefore, at the time of the accident he was not an insured person under the plain terms of the policy.”

In *Aetna Casualty & Sur. Co. v. DeMaison*, supra, 213 F.2d 826, the insured permitted his automobile to be taken by his son for the purpose of going to a movie in Jenkintown, Pennsylvania. The son drove 3 miles beyond Jenkintown where he met some friends and then decided to go to a diner 3 or 4 miles more distant. The son permitted one of his friends to drive. After 2 or 3 miles, an accident occurred. The District Court found permission under the omnibus clause. The Court of Appeals held that it could draw its

own conclusion from the facts, reversed the District Court and stated these principles (213 F.2d 831) :

“* * * (1) ‘there is no * * * liability if at the time of the accident the car is being driven at a time or place or for a purpose not authorized by the insured’; (2) permission by the insured owner to one to use his car may be express or implied; (3) the word ‘permission’ is to be construed as permission to use the car in a specified manner and for a specified purpose and where the policy provides ‘“the *actual* use is with the permission of the Named Insured”’ the words ‘actual use’ are to be construed as ‘“the particular use”’; (4) ‘The “*use or operation* * * * with the permission of the named assured” *refers to the time of the casualty and not to the time of granting consent* * * *’ and ‘Where the owner allows another the use of his car for a specific purpose, *restriction to such purpose is clearly implied. Express permission for a given purpose does not imply permission for all purposes.*’” (Emphasis supplied.)

In *Fisher v. Firemen's Fund Indemnity Company*, 244 F. 2d 194 (C.A. 10 Kan., 1957), Rumpf, an employee of the named insured, on Christmas Eve, sought and received permission from the named insured to take the insured truck to Udall, Kansas on Christmas Day to have dinner with his parents. Rumpf resided, and the truck was normally garaged, in Wichita, Kansas, some 15 miles northwest of Udall. On Christmas Eve Rumpf became involved in an accident with the insured truck approximately 100 miles from Wichita on a route not going to or near Udall. Rumpf performed no service for the insured after leaving Wichita and was admittedly on a personal journey at the time of the accident. The District Court found that Rumpf was not using the truck with the insured's permission. In affirming, the Court of Appeals said (244 F.2d 196) :

“At the time of the collision giving rise to appellants’ claims against Rumpf he had deviated in time, purpose, direction, and distance to such a degree from his express permissive use that it cannot be doubted that the actual use of the vehicle was not within the contemplation of the named insured. Persuaded as we are, absent a contrary Kansas ruling, that the minor deviation rule is properly applicable, it follows that the insurance company had no obligation to Rumpf under the omnibus feature of the insurance policy.”

The District Court’s Finding of Fact No. 5 reads as follows:

“The described policy of insurance afforded liability insurance coverage to the named insureds and, in addition thereto, to any person using the insured vehicle *with the permission of the insureds.*” (Italics ours.)

By appropriate objection,³⁵ the District Court was requested to delete the italicized portion and to insert in lieu thereof an accurate paraphrase of the language of the policy: “provided the actual use thereof was with the permission of the named insureds.” The failure of the District Court to change this finding demonstrates that it was not concerned with the precise language of the omnibus clause, but was basing its conclusion on the fact that Callahan had permission to use the Jeep in the first instance. In other words, the District Court applied the minority rule.

If the majority rule is applied, especially in the spirit of the authorities above cited, there can be no doubt that Callahan deviated grossly from the scope of his permission to use the Jeep. It cannot be said reasonably that when permission to use the Jeep was granted, it was contemplated that Callahan, a 17 year old employee-grand-

35. Tr. 22-23.

son, would use the Jeep from 2 o'clock to 6:30 in the morning, at a place 18 miles from Phoenix, for the purpose of running away from home or joy riding. Callahan was not an additional insured under Appellant's policy by the majority rule.

CONCLUSION

Appellant respectfully submits that the District Court erred in finding that Callahan was using the Jeep at the time of the accident with the permission of R. B. Smith, because Callahan's use of the Jeep at the time of the accident was a material deviation from the time, place and purpose for which he originally received permission, and consequently, he was not an additional insured under Appellant's policy.

Appellant, therefore, prays that the judgment of the District Court be reversed, with instructions to enter judgment for Appellant.

Respectfully submitted,

MOORE & ROMLEY

By JARRIL F. KAPLAN

Attorneys for Appellant

(Appendix Follows)

Appendix

Plaintiff's Exhibit No.	Description	RECORD PAGE NO.		
		Identified	Offered	Received
1	United States Fidelity and Guaranty Company Policy No. CLP 38913 issued to R. B. Smith dba Swan Cleaners	34	34	35
2	Deposition of Ronald G. Callahan	52	52	52



No. 16536

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY
COMPANY a Corporation

Appellant,

vs.

ROSCOE B. SMITH AND IDA SMITH, RONALD
G. CALLAHAN, HAROLD L. SMITH, RUTH SMITH
AND RONALD M. SMITH,

Appellees.

FILED

DEC 21 1959

PAUL P. O'BRIEN, C.

Appellees' Brief

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No. 16536

In the

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Appellant,

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ROSCOE B. SMITH AND IDA SMITH, RONALD
G. CALLAHAN, HAROLD L. SMITH, RUTH SMITH
AND RONALD M. SMITH,

Appellees.

PRELIMINARY STATEMENT

The position of all of the appellees in so far as the issues presented by this appeal are concerned is identical and they therefore all join in this brief.

STATEMENT OF THE CASE

The appellant in its opening brief sets forth its position as to the questions which are presented by this appeal. It is our feeling that these questions as set forth on page 3 of the appellant's opening brief must be modified and, in addition, must be supplemented by additional points presented for determination. We believe that the questions as set forth in its brief must be modified to read as follows:

1. Whether permission can be found where the insured and his bailee both concede there was not *express permission for the use of the vehicle at the time and place of the accident.*

2. Whether permission can be found where the bailee uses the insured automobile at a time, and at a place, and for a purpose for which he did not have express permission from the owner.

We believe that two further questions should be added:

3. May permission for the use of a vehicle be implied from a course of conduct on the part of the owner and the user; and

4. Where the use of a vehicle is with the implied permission of the owner, does the "omnibus clause" set forth on page 3 of appellant's brief cover such use?

STATEMENT OF FACTS

The appellant in its statement of facts has omitted what we believe to be highly pertinent testimony. We believe that a complete solution to this case requires the court's consideration of the following additional testimony:

Roscoe B. Smith:

"A. Well, I didn't tell him (Callahan) he couldn't use it, or I didn't tell him he could use it after he went home, because, naturally, he wasn't living with me."¹

* * * * *

"Q. I believe you testified a while ago, Mr. Smith, that you told Callahan he could take the Jeep home, and that he could do that for the purpose of having transportation to and from work?

1. Tr. 41.

A. Yes, sir.

Q. Did you also tell him that he could use the Jeep for any other purpose?

A. No, sir.

The Court: Did you tell him he couldn't?

The Witness: No, sir."²

* * * * *

Q. Mr. Smith, you did not tell this kid he could not use the truck, did you?

A. No, sir.

Q. You didn't tell him anything. You just turned the truck over to him, and he knew what he had to do with it at work, isn't that right?

A. Yes, sir.

Q. And you didn't say anything about what he might do with it afterward, is that right?

A. No, sir.

Q. You knew he went to California, didn't you?

A. I did afterward.

Q. Afterward. You didn't give him permission to go, did you, Mr. Smith?

A. No.

Q. And you didn't reprimand him when he came back for using the truck, did you?

A. No, sir.

Q. As a matter of fact, he brought a daughter of yours back, I believe, did he not?

A. Yes, sir.

Q. The gasoline was bought at the Signal Service at 6th Street and Van Buren, is that right?

2. Tr. 42.

A. Yes; we trade there.

Q. He had the unrestricted right to buy gasoline and other products there, is that right?

A. Yes, sir; for the truck.

Q. Yes; for the truck. I don't mean for anything else. You didn't ever tell him that he could not buy gasoline there?

A. No, sir.

Q. As a matter of fact, you knew your bills were running a little higher on that truck than they should run just for ordinary pickup and delivery work that he we doing, didn't you?

A. They ran pretty high.''³

* * * * *

Q. You knew his gasoline bills were running higher, didn't you?

A. Yes.

Q. And you never said an adverse word to the kid, did you?

A. No, sir.

Q. You didn't say 'you can't use the truck'?

A. No, I didn't.

Q. No, never did. In addition to the time that he went to California, Mr. Smith, you knew that he had used the truck here in town, didn't you?

A. I knew he did some.

Q. Well, as a matter of fact, your son Bill back here, Harold, for the record, told you that he had, didn't he?

A. Yes, sir.

Q. You never said 'Don't let that kid do this, that, or the other thing, did you, with that truck?

A. I believe I explained that a while ago.

Q. You mean that your son was to tell him what to do?

A. Yes, sir.

Q. And whatever your son told him was all right, was within your permission, is that right?

A. That is right.”⁴

* * * * *

“Q. You say you don’t know because you didn’t see the kid do it (drive the truck) is that right?

A. That is right.

Q. But you had a pretty good idea he was doing it, didn’t you?

A. Yes, sir.”⁵

* * * * *

Harold Smith testified in part as follows:

“Q. He (Callahan) drove it in the evenings for purposes other than his work?

A. Yes.

Q. Did you know about that?

A. Yes.

Q. Did you tell him he could not do so?

A. No.

Q. How did he treat that car?

* * * * *

A. Oh, just like it was his own.”⁶

4. Tr. 50.

5. Tr. 52.

6. Tr. 59.

SUMMARY OF ARGUMENT

The problem presented to the court for decision is the correct interpretation of what is known as the "omnibus clause" of the policy of liability insurance which was issued by the plaintiff to the defendant Roscoe B. Smith. The pertinent provisions of this clause are set forth on page 3 of appellant's opening brief. We believe that the argument may be summarized in three points:

POINT ONE.

Where permission to use a vehicle is given in the first instance, any use while the vehicle is in the possession of the person to whom it was originally intrusted is a use covered by the omnibus clause, 5 ALR 2d. 629, and this rule should be adopted in this case in view of the Financial Responsibility provisions of the State of Arizona.⁷ *Arnold v. State Farm Mutual Automobile Ins. Co.* 7 Cir, 1958, 260 2d, 161; *Konrad v. Hartford Accident & Indemnity Co.* (Ill. 1956) 137 N.E. 2d, 855.

* * * * *

POINT TWO.

Permission for the use of a vehicle may be implied from the acts and conduct of the owner and the user, and if implied permission for a use is found, such use is covered by the omnibus clause. 5 ALR 2d, 608; *Stoll v. Hawkeye Cas. Co.* 8 Cir, 193 F. 255; 7 Appleman Ins. Law and Practice, Sec. 4365.

7. A. R. S. 28-1170 provides in part as follows:

B. The owner's policy of liability insurance must comply with the following requirements:

2. It shall insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured * * * ."

POINT THREE.

Where testimony is susceptible of opposing inferences, any one of which would support the findings of fact and judgment rendered by a trial court, then such findings and judgment will not be disturbed upon appeal. *Trotter v. Union Ind Co.*, 9 Cir, 35 F. 2d, 104.

ARGUMENT

POINT ONE: *WHERE PERMISSION IS INITIALLY GIVEN*

Even in the absence of the existence of an implied permission to use the vehicle at the time, place and manner in which it was used, the appellees maintain that the judgment in this case must be affirmed. The rule in circumstances where permission for use is initially given but varies from such initial permission, is stated in 5 ALR 2d, page 629, as follows:

“According to the so-called liberal rule the bailee need only to have received permission to take the vehicle in the first instance, and any use while it remains in his possession is with permission though that use is for a purpose not contemplated by the employer when he parted with possession of the vehicle. In other words, if the original taking was with the insured’s consent, every act subsequent thereto while the employee is driving the car is held to be with the insured’s permission in order to permit a recovery under the omnibus clause.

Under this rule a deviation from the permitted use is immaterial, the only essential thing being that permission be given for use in the first instance.”

* * * * *

“The rationale of this rule apparently is that even an ordinary automobile liability insurance contract is as much for the benefit of members of the public as for the benefit of the named or additional insured and that therefore upon an injury occurring, it would be undesirable to permit litigation as to the use made

of the automobile, the scope of permission given, the purposes of the bailment, and the like.”

* * * * *

“Such construction of the policy is also in accord with the purpose of the various statutes adopted by several states requiring owners of automobiles to carry indemnity or liability insurance. These statutes are enacted to protect the public using the streets and highways, as a matter of public policy. The intent of the legislature is to protect those injured by automobiles, no matter who may be driving the car or where it is driven, provided the owner has voluntarily entrusted possession of the car to the driver for some purpose, and regardless of whether the person in possession of the car observes or breaks the contract of bailment.”

5 A. L. R. 2d, Pages 629 and 630.

The appellant in its opening brief has characterized this as the “minority rule” and the so-called “slight deviation rule” as an expression of the majority rule. We will not quibble with appellant as to which rule constitutes the minority and which the majority rule, but we direct the court’s attention to *Konrad v. Hartford & Idemnity Co.* (Ill. 1956) 137 N.E. 2d, 855, 861, where the rule set forth above is cited and is “weight of authority,” The court’s attention is also directed to the summary of the various rules as set forth in 5 ALR 2d, at page 623.

This issue is a question of first impression in the State of Arizona. Under these circumstances courts are more interested in adopting a rule which is consistent with reason and with the policy of the jurisdiction rather than in determining the number of jurisdictions which may have adopted one rule or another.

The Safety Responsibility Act adopted by the State of Arizona in 1951 (See footnote 7) provides in part

that a "motor vehicle liability policy" to be acceptable as security under the Act shall "insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express *or implied* permission of the named insured, * * *" (A.R.S. 28-1170 B (2)). In addition, the same section provides " * * * no statement made by the insured or on his behalf and no violation of the policy shall defeat or void the policy." A number of other jurisdictions have enactments similar to the Arizona Financial Responsibility Law. In the case of *Arnold v. State Farm Mutual Insurance Co.* 7 Cir, 260 F. 2d, 161, an employee was given the keys to a truck owned by the insured to feed and water livestock. He was also granted the use of the car in looking after the farm chores on the two farms owned by his employer during the illness of the employer. The employee drove to Farm No. 2 where he watered livestock and then drove to a town approximately 15 miles away. There the employee contacted a bootlegger and purchased and drank whiskey. On his return trip he was involved in an accident. The State of Indiana had an enactment similar to the Arizona Statute, and in this connection the court said:

"We hold, therefore, that under Indiana law, one who has permission of an insured owner to use his automobile continues as such a permittee while the car remains in his possession, even though that use may later prove to be for a purpose not contemplated by the insured owner when he entrusted the automobile to the use of such permittee. This is to say that under such circumstances a deviation in use from that intended by the insured owner will not operate to terminate such permission granted. It necessarily follows that, under the instant omnibus clause, protection as an additional insured is afforded the employee-permittee even though there was a deviation in his use of the motor vehicle."

To the same effect see *Konrad v. Hartford Accident & Indemnity Co.* (supra)

In construing the effect of the Massachusetts Compulsory Insurance laws the court in *Dickinson v. Great American Ind Co.*, 1937, 6 N. E. 2d, 439, at page 441, said:

“The policy provided indemnity and protection against loss only to the insured and to ‘any person responsible for the operation of the insured’s motor vehicle with (its) express or implied consent.’ G. L. (Ter.Ed) c. 90, Sec. 34A. The language of the policy prescribed by the statute should be construed liberally to accomplish the humane purpose of the Legislature to protect travellers on the highway from injury by motor vehicles. If an insured owner of an automobile, expressly or by implication, gives his consent to another to take it upon the highway and there operate it, the right of operator to indemnity from subsequent loss exists even though the vehicle be operated in a manner, or by persons, or at times and places not authorized or even if such uses be forbidden by the owner.”

We believe that the intent and purpose of the Arizona Legislature and the public policy of the State as declared by our Legislature would best be expressed by this court’s adopting the rule which we have set forth above.

POINT TWO: IMPLIED PERMISSION

The appellant in its brief has chosen to shun a discussion of implied permission; however, there can be no question but the permissive use need not be expressed but may be implied. This rule is stated in 5 ALR 2d, at page 608, as follows:

“While in many instances the omnibus clause expressly provides that the permission of the named assured may be express or implied, thus avoiding any doubt

in regard to this matter, the more common practice among insurers is not to refer specifically in the clause to the nature of the required permission. However, there can be hardly any doubt that the term 'permission,' even if standing alone, includes as the word is used in the omnibus clause permission implied by the present or past conduct of the insured."

In support of the foregoing statement, the ALR annotation cites cases from thirteen jurisdictions. Our research has failed to disclose any jurisdiction which does not recognize the doctrine of implied permission. Two cases illustrative of this doctrine are *Traders & General Ins. v. Powell*, 8 Cir, 177 Fed 2d, 660, and *State Farm Mutual Automobile Ins Co. v. Cook* (Va. 1947), 43 S.E. 2d, 863. In the Powell case the employee was permitted to take his employer's logging truck home in the evening as transportation to and from his work. The owner testified that no personal use was to be made of the truck aside from the transportation to and from work. Testimony was presented that the employee perhaps, in violation of this instruction, had used the truck for personal reasons under such circumstances that the employer could have known of such personal use. The court, in summarizing the evidence, at page 665, said:

"The evidence warrants the inference that Sturgis (owner) knew that Hardy (employee) was using the truck as his own; that he was disobeying the instruction not so to use it; and that Sturgis acquiesced in such use. That Sturgis impliedly consented to the use of the truck on the occasion in question is, therefore, a reasonable inference. This conclusion is strengthened by the fact that Sturgis permitted Hardy to keep the keys to the truck at all times."

In the Cook case, an employee was permitted to drive the insured vehicle home without being told that it could or could not be used for his own pleasure and purpose. The owner saw the vehicle being used from time

to time and did not forbid such use. The employee and a companion used the vehicle to go to a beer parlor, and the employee, who became intoxicated, permitted his companion to drive. The companion was driving at the time of the accident. The Virginia court upheld a finding that the vehicle was being used with the implied permission of the insured at the time of the accident.

The appellant in its first specification of error⁸ objects to Finding of Fact No. 5 apparently on the ground that this finding did not use the phrase "actual use" of the vehicle the language used in the Policy Clause. This specification is without foundation and does not affect the principles which we have set forth above. The word "actual" does not add or detract from the insurer's liability under the omnibus clause of a policy. *Waites v. Indemnity Ins. Co.* (La) 40 So. 2d, 746; *Colins v. New York Cas. Co.* (W. Va.) 82 S.E. 2d, 288.

POINT THREE: *TRIAL COURT'S FINDINGS AND JUDGMENT ARE TO BE SUSTAINED ON APPEAL*

Rule 52 (a) Rules of Civil Procedure provides that findings of fact shall not be set aside unless clearly erroneous. It does not require the extensive citation of authorities to sustain the proposition that where a trial court's conclusions and findings based upon evidence from which different reasonable inferences could be fairly drawn that the court of appeals cannot disturb such findings unless they are clearly erroneous. We sub-

8. Page 6, appellant's opening brief.

mit that the findings of fact and judgment entered by the trial court are based upon reasonable inferences from evidence and cannot be disturbed on appeal.

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By JACK C. CAVNESS

No. 16,536

In the
United States Court of Appeals
For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY
COMPANY, a corporation,

Appellant,

vs.

ROSCOE B. SMITH and IDA SMITH, RONALD
G. CALLAHAN, HAROLD L. SMITH, RUTH
SMITH and RONALD M. SMITH,

Appellees.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona

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No. 16536

In the
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UNITED STATES FIDELITY AND GUARANTY
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Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona

REPLY TO POINT ONE

Appellees urge the Court to adopt the so-called "liberal rule" that once permission to use the car is given for any purpose, permission to use it for all purposes is implied. They argue that this rule would express the public policy of Arizona as declared by the Motor Vehicle Financial Responsibility Act (A.R.S. § 28-1101, *et seq.*).

The Arizona Motor Vehicle Financial Responsibility Act is not a compulsory insurance law. The Act merely pro-

vides for suspension of the license of an operator (or motor vehicle registration of an owner) involved in a certain type of accident, unless there is in effect an insurance policy covering the liability of the operator for damages resulting from the accident. A.R.S. § 28-1142 The Act does not apply (A.R.S. § 28-1143) :

“3. To the owner of a motor vehicle if *at the time of the accident* the vehicle was being operated without his permission, express or implied, or was parked by a person who had been operating the motor vehicle without permission.” (Emphasis supplied)

If an operator fails to pay, or make proper arrangements to pay, a judgment against him within 60 days after it is rendered, the operator's license will be suspended. A.R.S. § 28-1161, 1162 The license will remain suspended until the judgment is satisfied, in whole or in part, and the operator gives proof of financial responsibility in the future. A.R.S. § 28-1163 Such proof may be in the form of a certificate that there is in effect a motor vehicle liability policy for the operator's benefit, but in that event the policy must “insure the person named therein and any other person, as insured, using the motor vehicle or motor vehicles with the express or implied permission of the named insured * * *.” A.R.S. § 1168, 1170.

The Act does not express a public or legislative policy in Arizona in accord with the so-called “liberal rule”. It expresses just the opposite. According to the liberal rule there is permission under the omnibus clause, regardless of the use made of the car at the time of the accident, if there was permission to use the car in the first instance. Under A.R.S. § 28-1143, the Act does not apply to the owner of the car if it was being operated without his express or implied permission *at the time of the accident*. If the Arizona

Legislature has indicated a policy, the policy is expressed by the minor deviation rule: Permission exists only when, at the time of the accident, the car is being used at a time or place or for a purpose contemplated by the parties when permission was first given, or else the use is merely a slight deviation therefrom.

None of the cases cited by Appellees relies upon a financial responsibility act such as Arizona's as the basis for adopting the liberal rule. In *Arnold v. State Farm Mutual Insurance Co.*, 260 F.2d 161 (C.A. 7 Ind., 1958) the only Indiana statute mentioned is one requiring all liability insurance policies issued in Indiana to contain an omnibus clause. In *Konrad v. Hartford Accident & Indemnity Co.*, 11 Ill. App. 2d 503, 137 N.E. 2d 855 (1956) the court made mention of the financial responsibility act of Illinois, but was actually dealing with a compulsory insurance statute applicable to common carriers. In *Dickinson v. Great American Ind. Co.*, 296 Mass. 368, 6 N.E. 2d 439 (1937) the court was again dealing with a compulsory insurance statute. We note that while the court, in *Dickinson*, adopts the liberal rule, it didn't apply that rule, and instead affirmed a judgment for the insurer even though the facts disclosed initial permission.

There is no compulsory insurance statute in Arizona. The Arizona Motor Financial Responsibility Act supports the minor deviation rule. There is no permission unless there is express or implied permission for the use made of the car at the time of the accident, not just initially. If, at the time of the accident, the car is not used at a time or at a place or for a purpose contemplated by the parties when the use was initially permitted, there is no coverage under the omnibus clause unless the deviation from permitted use is minor.

REPLY TO POINT TWO

Appellant is accused of shunning a discussion of implied permission. This accusation demonstrates either a lack of understanding of the legal principles involved, or a lack of any meritorious answer to Appellant's position.

The truth is that Appellant's entire brief is devoted to the question of implied permission.¹ There are two rules of "implied permission". One rule is that express permission for any given purpose *implies* permission for all purposes. The second rule is that express permission for a given purpose does not *imply* permission for all purposes, and unless permission for the actual use made at the time of the accident can be *implied*, there is no coverage under the omnibus clause.²

Appellees do not answer Appellant's proposition that Callahan's use of the Jeep from 2 o'clock to 6:30 in the morning, at a place 18 miles from Phoenix, for the purpose of running away from home or joy riding, was a radical departure from the use contemplated by R. B. Smith and Callahan when Callahan was originally permitted to use the Jeep. Rather, they quote certain portions of the testimony, out of context, and contend that this testimony supports a finding that Callahan had implied permission to use the Jeep at the time and place of the accident in question.³ When the isolated testimony is considered in context and in

1. See first paragraph at top of page 10, Appellant's Opening Brief.

2. Permission for the actual use at the time of the accident may be expressly given, but in this case it is conceded there was certainly no express permission.

3. The District Court did not make a finding of "implied" permission. It was specifically asked to do so (Tr. 22-23) and refused. As pointed out in Appellant's Opening Brief (page 23), the District Court's finding of permission was based upon the liberal rule.

company with the applicable rules of law, Appellees' contention is found to have no merit.

First, Appellees quote the testimony of R. B. Smith that he expressed no restrictions on Callahan's use of the Jeep. Appellees do not quote all the additional testimony that when R. B. Smith permitted Callahan to use the Jeep, he told Callahan he was letting Callahan use it for the purpose of having transportation to and from work; and that was the only purpose.⁴ Smith and Callahan also understood, apparently without discussion, that Callahan could use the Jeep to run errands to the grocery and drug store.⁵ Under both the law and the facts, Callahan's use of the Jeep was restricted to those purposes. The law was well-stated by this Court in *Trotter v. Union Indem. Co.*,⁶ 35 F.2d 104 at 105-106 as follows:

"* * * the most that can be said for appellant is that restrictions upon the use of the car were not expressed by the owner when he gave Hickey possession thereof. But, admittedly, the only object Grill had was to aid Hickey in carrying to success the business enterprise in which they were both interested. Hence a restriction to that purpose, in the absence of evidence to the contrary, is clearly implied. * * *"

Here, the only purpose was to provide Callahan with a means of getting back and forth to and from work, and running errands. There was no evidence to the contrary. Furthermore, Callahan knew and understood that his use of the Jeep was restricted to those purposes.⁷

4. Tr. 39, 42, 92-94.

5. Tr. 47-48, 94.

6. Briefed and quoted from at length in Appellant's Opening Brief, pages 14-15.

7. Tr. 47-48, 51, 94.

In order to fully understand the other testimony quoted by Appellees, it must be put back into context. Also, it is necessary to legally define implied permission. "Implied permission" has been defined in varying ways. It is said to be something more than mere sufferance or tolerance without taking steps to prevent. 45 *C.J.S., Insurance*, Sec. 829, p. 927. It is also said to be an inference arising from a course of conduct in which there is mutual acquiescence or lack of objection signifying consent.⁸ Appellees have failed to show wherein there is any evidence to support an inference that Callahan was using the Jeep at the time and place of the accident with the "acquiescence" or "consent" of R. B. Smith.

Putting the testimony back into context, it amounts to this: At some time prior to the accident Callahan took the Jeep without permission and returned to his home in California. R. B. Smith did not reprimand Callahan when the latter came back to Arizona.⁹ Callahan had the unrestricted right to buy gasoline for R. B.'s trucks, and R. B. knew the gasoline bills were running high, but he didn't know for which trucks the gasoline was purchased.¹⁰ R. B. had a pretty good idea Callahan was running around in the Jeep, and in fact, Harold Smith told R. B. that Callahan was doing so. R. B. did not approve of this, but he didn't say anything to Callahan because Callahan was living with Harold, and Harold was supposed to supervise Callahan.¹¹ R. B. did tell Harold to see to it that Callahan had Harold's

8. This definition is contained in *State Farm Mutual Auto. Ins. Co. v. Cook*, infra page 8, cited by Appellees.

9. Tr. 46-48.

10. Tr. 49-50.

11. Tr. 41, 47-48, 50-52, 60-63.

permission before taking the Jeep out in the evening to run around.¹² Callahan knew that he was supposed to have permission from Harold (his uncle) or R. B. (his grandfather) before taking the Jeep after work in the evening for purposes other than errands.¹³ At the time of the accident Callahan had no permission to use the Jeep because he was not working, he was not on any errand and he had not sought or obtained permission from either Harold or R. B. to take the Jeep.¹⁴

The only conflict in the evidence is the testimony of Harold Smith that Callahan used the Jeep like it was his own, as opposed to the testimony of Callahan that he seldom went out in the evenings but when he did he first asked Harold's permission.¹⁵ This conflict raises no inference of implied permission. Assuming Harold's version to be true, R. B. stated his disapproval and told Harold to not let Callahan run around in the Jeep without Harold's permission.

There is absolutely nothing in the evidence in this case to suggest that R. B. Smith "acquiesced" in or "consented" to Callahan's use of the Jeep for any purpose Callahan saw fit. All the evidence is to the effect that R. B. was very much opposed to any unauthorized use of the Jeep by Callahan and "acquiesced" therein or "consented" thereto only if Callahan first obtained Harold's permission.

The two cases cited by Appellees are not in point. In *Traders & General Ins. Co. v. Powell*, 177 F.2d 660 (C.A. 8 Ark., 1949),¹⁶ there was evidence warranting the infer-

12. Tr. 47-48, 50, 62-63.

13. Tr. 94-97.

14. Tr. 45-46, 100-101, 105.

15. Tr. 59, 94-96.

16. In which there is a strong dissent.

ence that the owner not only knew the user was using the insured truck as his own, but also that the owner *acquiesced* in such use. In *State Farm Mutual Auto. Ins. Co. v. Cook*, 186 Va. 658, 43 S.E. 2d 863, 5 A.L.R. 2d 594 (1947), the evidence again warranted the inference that the owner not only knew of his employee's use of the insured truck for personal purposes, but that the owner also *acquiesced* therein; the evidence showed that the owner's attitude was that the employee could use the insured truck as he saw fit, but if he used it for his own purposes "it would be on his own hook."

Appellees would have the Court assume an attitude of "acquiescence" or "consent" on the part of R. B. Smith when all the evidence shows he had no such attitude. R. B. Smith testified, in effect: "When I found out that Callahan was using the Jeep to run around in, I told Harold to make sure he didn't do it without Harold's permission." Harold Smith testified, in effect: "I told R. B. that Callahan was running around in the Jeep. R. B. didn't like it, and he told me to not let Callahan use the Jeep to run around in." Callahan testified, in effect: "I was not supposed to take the Jeep in the evening to ride around without permission from R. B. or Harold." There is nothing in the evidence to warrant an inference that R. B. Smith "acquiesced" in or "consented" to Callahan's taking the Jeep at 2:00 o'clock in the morning, while Harold was asleep, for the purpose of running away from home or joy riding, and his subsequent driving around for approximately four hours, ending in an accident at a place 18 miles distant from Phoenix.

Appellees have made no attempt to answer the cases cited by Appellant as illustrating the application of the minor deviation rule.¹⁷ Under that rule there is no question

17. Appellant's Opening Brief, pages 20-23.

that Callahan's use of the Jeep at the time of the accident was without "permission" under the omnibus clause. His use of the Jeep at the time of the accident was an extreme departure from the time, place and purpose intended or contemplated, not only at the time permission was originally granted, but at any time prior to the accident.

REPLY TO POINT THREE

Naturally, Appellees would like the Court to conclude that the evidence raises opposing inferences, one of which sustains the trial court, and to then summarily dispose of this case on the basis of the clearly erroneous rule. However, the evidence does not raise any opposing inferences of fact. The finding of "permission" was a legal inference as to the effect of the transactions or events disclosed by the evidence; there was no essential dispute as to what was said or done. The clearly erroneous rule is not applicable. This Court is free to draw its own conclusions. *Aetna Casualty & Sur. Co. v. DeMaison*, 213 F.2d 826 (C.A. 3 Pa., 1954)

We submit that Appellees have made no valid answer to the propositions in Appellant's Opening Brief. The minor deviation rule is the most fair and reasonable interpretation of the term "permission", and the rule most likely to be adopted in Arizona. Appellees do not challenge the cases cited by Appellant or even Appellant's statement of the facts. They quote certain portions of the testimony out of context, hoping to sell the idea of an inference that R. B. Smith "acquiesced" in or "consented" to any and all use of the Jeep by Callahan. But when the testimony is placed in context, no such inference can reasonably be drawn. The evidence shows, and both R. B. Smith and Callahan admit, that Callahan's use of the Jeep at the time of the

accident was beyond the scope of Callahan's permission. The District Court, therefore, erred in its finding that Callahan did have permission.

Respectfully submitted,

MOORE & ROMLEY

By JARRIL F. KAPLAN

Attorneys for Appellant

No. 16,552 ✓

**United States Court of Appeals
For the Ninth Circuit**

HARRY JOSEPH PAYNE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

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No. 16,552

**United States Court of Appeals
For the Ninth Circuit**

HARRY JOSEPH PAYNE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE

JURISDICTION

Jurisdiction is founded under Title 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

Appellant, confined in Alcatraz Penitentiary, filed an application for Writ of Habeas Corpus on January 14, 1959, and an Order to Show Cause was then issued by Judge Lloyd H. Burke. After arguments and briefs were submitted, Judge George B. Harris denied the issuance of the Writ and discharged the Order to Show Cause in an opinion handed down on June 25, 1959.

STATEMENT OF THE FACTS

On March 16, 1956, in the Eastern District of Tennessee, Southern Division, appellant was sentenced under six informations and one indictment, numbered consecutively from 10676 to 10682. The transcript of the sentencing of the appellant is as follows:

“The Court. ‘ . . . The first count of No. 10,676 is a charge of first uttering and publishing as well as having in possession, that is probably two different things, anyway I am putting one year on each count, concurrent.

‘No. 10,677 is breaking into a post office at Campaign, Illinois, the second count is stealing the money orders at the time. So, I am just putting that as two years on the first count and one year on the other, making it concurrent or making two years for that charge.

‘No. 10,678 I will have to start back, 10,678 as I have it now corrected. In that case you are charged with breaking into a post office at Nunnely, Tennessee, secondly stealing property from the postal department, which I assume to be the same offense. And 10,678, two years on the first count, one year on the second count, concurrent. That is the way I have got that.

‘Now, No. 10,679, is breaking in two different post offices, one at Hurricane Mills and the other one at Nunnely, the same thing. I have No. 10,679 as two years on the first count, and one year on the second count concurrent.

‘No. 10,680, is a one-count indictment, breaking into the post office at Dukedom, Weakly County, two years on that.

‘No. 10,681, is from the Eastern District of Wisconsin, cashing two money orders as I get it. One year on each count, concurrent.’

‘And then the last No. 10,682, breaking and entering the post office building in the Western District of Missouri that is two years, and all the different indictments will be consecutive. Now, let’s see that is thirteen years, is that correct?’

Gen’l Meek. ‘I figure twelve.’

Mr. Thrasher. ‘I figure twelve.’

Clerk. ‘Thirteen is right.’

The Court. ‘I figure fourteen. One as I say it was involving the same instance, I took off one.

Did you get it, Mr. Thrasher? 10,676, one year; 10,677 two years; 10,678 two years; 10,679, two years; 10,680 two years, 10,681 is two years, 10,682 is two years, consecutive as to all cases.’

Gen’l Meek. ‘10,681, how is that?’

The Court. ‘It is two years.’ ”

* * * * *

Appellant now contends that the total sentence imposed upon him was only two years.

QUESTION PRESENTED

Did the sentencing court properly impose consecutive sentences upon the appellant?

ARGUMENT

The basis of appellant’s contention is a dictum in the case of *United States v. Patterson*, (C.C.), 29 F.

775, to the effect that where consecutive sentences are intended by the sentencing judge, the specific order of service must be directed and cannot in any way be implied. The *Patterson* case is also cited for the proposition that the sentencing judge's failure to direct that a second sentence, pronounced consecutive to the first, will begin from and after the service of the first, will make the sentences concurrent, even though the judge has made clear his intention to impose consecutive sentences. In the case of *United States v. Daugherty*, 269 U.S. 360, the Supreme Court relaxed the formalistic rule of the *Patterson* case holding that:

“ ‘Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded.’ ”

It distinguished *Patterson* on the grounds that in *Patterson* separate indictments were involved, whereas in *Daugherty* the sentences were pronounced on different counts of the same indictment, which indictment provided a ready and obvious order in which the sentences could be served. The question before this Court is whether, under the rule announced in *United States v. Daugherty*, the intent of the sentencing court was sufficiently definite so as to “exclude any serious misapprehensions by those who must execute.” We wish to make clear that the case before this Court is not whether the total sentence imposed upon this appellant is twelve years, thirteen years, or fourteen years, but merely whether the appel-

lant has no right to be released after serving two years.

Several cases have applied the *Daugherty* rule to situations similar to that before the bar here. In the case of *Kennedy v. Reid*, 249 F. 2d 492 (D.C. Cir.), the Court was faced with a situation where the District Judge imposed consecutive sentences in indictments 438-54, 439-54, and 440-54 without specifying the order in which the sentences were to be served except that he said that the second was to be consecutive to the first and the third to be consecutive to the second. Through an error, the commitment stated that the sentences were to be served concurrently. When this error was discovered and appellant reimprisoned, he brought Habeas Corpus.

Two issues were before the Court; first, whether the commitment could be modified to correct the clerk's error and reflect the original sentence of the Court, and secondly, whether the sentence pronounced by the Court was sufficiently definite. As to both questions, the Court of Appeals held in the affirmative, provoking a dissent from Judge Fahy on the ground, among others, that the sentence was not sufficiently definite. Judge Fahy in his dissent stated:

"If the distinction of *Patterson*, drawn by the Supreme Court in *Daugherty* (that of separate counts of the same indictments) is not thought to be altogether persuasive—or if it is thought that *Patterson* is too technical—there are factors of substance here not present in *Patterson* which do persuade that the result reached in *Patterson* should be reached here."

In the case of *Barker v. Looney*, 261 F. 2d 616, the 10th Circuit was faced with a situation very similar to the instant one. There, on a series of six indictments, the trial judge sentenced the appellant to six five-year terms, stating at the end "... and each of the sentences will run consecutively." The commitment provided an order to the sentences as does the commitment in this case. The 10th Circuit, in a per curiam opinion stated:

"The basis for the application for the writ is that the sentences were so indefinite and uncertain as to render them void. The trial court found, after a full hearing, that the sentences orally imposed by the court were reasonably definite, certain and consistent, and that the fair and reasonable intendment of the several sentences imposed on Paul Dean Barker was that in the order of their pronouncement the second was to run consecutively with the first; the third consecutively with the second; the fourth consecutively with the third; the fifth consecutively with the fourth; and the sixth consecutively with the fifth, and that there was no conflict between the oral sentences imposed and the written judgment and commitment signed by the trial judge."

"We think the sentences, on their face, 'with fair certainty' disclose 'the intent of the' sentencing 'court,' as found by the court below in the instant case, and the order is therefore affirmed."¹

¹See *United States v. Daugherty*, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309."

A District Court case on the same point is *Cole v. Sanford*, 48 F. Supp. 729 (N.D. Ga.). There the

Court, dealing with two consecutively numbered indictments, stated:

“It seems to me, therefore, that this is a case where one may state ‘with fair certainty,’ if not with confidence, that the language used, in the circumstances shown, reveals the intent of the Court to make the sentence in number 9392 commence to run after the completion of the sentence in number 9391, and excludes ‘any serious misapprehensions by those who must execute them.’”

Lastly, in the case of *Fleish v. Swope*, 9th Cir., 226 F. 2d 310, the Court dealt with sentences under different counts of the same indictment. However, the language of the Court is easily applicable to this matter. As the Court in its per curiam opinion stated:

“Apparently appellant’s argument is that if the judge who imposed the sentence required three seconds to pronounce or read each item of the quoted judgment then each sentence on Count 3 began three seconds after his sentence on Count 1, and that in like manner each term thereafter named began three seconds after the preceding one. The argument is that was the literal meaning and effect of the judgment rendered by the court and that terms of imprisonment so construed would, as a matter of law, run ‘consecutively.’ . . .

As for the sufficiency of the judgment to provide, as the court obviously intended, that the terms of five years should be served consecutively and to follow each other in sequence, this court’s decision in *Lipscomb v. Madigan*, 9 Cir., 224 F. 2d 410, is sufficient authority.”

The Government respectfully contends that there is no possible prejudice to the appellant in the manner in which the consecutive sentences were pronounced and that this Court should not apply any formalistic rule which would violate the spirit of the *Daugherty* case, the subsequent cases interpreting *Daugherty* and the obvious intention of the trial judge.

Accordingly, the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
September 10, 1959.

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Assistant United States Attorney

Attorneys for Appellee.

No. 16553

United States
Court of Appeals
for the Ninth Circuit

DAN O. HOYE, as Controller of the City of Los Angeles, DAN O. HOYE and THE CITY OF LOS ANGELES, Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL, Director of Internal Revenue, Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

FILED

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No. 16553

United States
Court of Appeals
for the Ninth Circuit

DAN O. HOYE, as Controller of the City of Los
Angeles, DAN O. HOYE and THE CITY OF
LOS ANGELES, Appellants,

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UNITED STATES OF AMERICA and ROBERT
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Appellees.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
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(Cause No. 16553)

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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* Page numbers appearing at bottom of page of Original Transcript of Record.

United States District Court For The Southern
District of California, Central Division

No. 1065-57-T Civil

DAN O. HOYE, as Controller of the City of Los
Angeles, and DAN O. HOYE, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROBERT A. RIDDELL, Director of Internal Revenue, and RICHARD A. WESTBERG,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff in Intervention,

vs.

DAN O. HOYE, CITY OF LOS ANGELES, and
RICHARD A. WESTBERG,
Defendants in Intervention.

ANSWER OF CERTAIN DEFENDANTS
IN INTERVENTION

Come Now defendants in intervention, Dan O. Hoyer, and City of Los Angeles, a municipal corporation, and answering the Amended Complaint In Intervention For Penalty and For Foreclosure of Internal Revenue Tax Lien Against Personal Property for themselves only and for no other

defendant in intervention admit, deny and allege as follows: [1-A]

Answer to First Cause of Action

I.

These answering defendants in intervention admit paragraphs numbered 1, 4, 6, 7, 8, and 9, of said Complaint in Intervention.

II.

These answering defendants admit that the above entitled court has jurisdiction of matters arising under 28 U.S.C. paragraphs 1340, 1345; denies that the above entitled court has jurisdiction in the instant action under 26 U.S.C. 7401, 7403, and 6332, as alleged in paragraph 2, of said complaint, and alleges that no facts exist in the instant case that come within said sections 7401, 7403, and 6332; that the money in the hands of the defendant in intervention, Dan O. Hoyer, as Controller of the City of Los Angeles, is held by virtue of California Code of Civil Procedure, Section 710; that said Section 710 reads as follows:

“[Enforcement of judgment against debtor to whom money is owed by state, county, etc.: Procedure.] (a) Whenever a judgment for the payment of money is rendered by any Court of this State against a defendant to whom money is owing and unpaid by this State or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may

file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

1. If such money, wages or salary is [1-B] owing and unpaid by this State to such judgment debtor, said judgment creditor shall file said abstract or transcript and affidavit with the state department, board, office or commission owing such money, wages or salary to said judgment debtor prior to the time such state department, board, office or commission presents the claim of such judgment debtor therefor to the State Controller or to the State Personnel Board. Said State department, board, office or commission in presenting such claim of such judgment debtor to said State Controller shall note thereunder the fact that the filing of such abstract or transcript and affidavit and state the amount unpaid on said judgment as shown by said affidavit and shall note also any amounts advanced to the judgment debtor by, or which the judgment debtor owes to, the State of California by reason of advances for expenses or for any other purpose. Thereupon the State Controller, to discharge such claim of such judgment debtor, shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due such judgment debtor on such claim, after deducting from such claim an amount sufficient to reimburse the state department, board, officer or commission for any

amounts advanced to said judgment debtor or by him owed to the State of California, and after deducting [1-C] therefrom an amount equal to one-half the salary or wages owing to the judgment debtor for his personal services to the State rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

2. If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body [1-D] rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the great-

est extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

(b) The judgment creditor upon filing such abstract or transcript and affidavit shall pay a fee of two dollars and fifty cents (\$2.50) to the person or agency with whom the same is filed.

(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor.

(d) In the event the moneys owing to a judgment debtor by any governmental agency mentioned in this section are owing by reason of an award made in a condemnation proceeding brought by the governmental agency, such governmental agency may pay the amount of the award to the clerk of the court in which such condemnation proceeding was tried, and shall file therewith the abstract or transcript of judgment and the affidavit filed with it by the judgment creditor. Such payment into court shall constitute payment of the condemnation award within the meaning of Section 1251 of this code. Upon such [1-E] payment into court and the filing with the county clerk of such abstract or transcript of judgment and affidavit, the county clerk shall notify by mail, through their attorneys, if any, all parties interested in said award of the time and place at which the court which tried the condemnation proceeding will determine the conflicting claims to said award. At said time and place the court shall make such determination

and order the distribution of the money held by the county clerk in accordance therewith.

(e) The judgment creditor may state in the affidavit any fact or facts tending to establish the identity of the judgment debtor. No public officer or employee shall be liable for failure to perform any duty imposed by this section unless sufficient information is furnished by the abstract or transcript together with the affidavit to enable him in the exercise of reasonable diligence to ascertain such identity therefrom and from the papers and records on file in the office in which he works. The word "office" as used herein does not include any branch or subordinate office located in a different city.

(f) Nothing in this section shall authorize the filing of any abstract or transcript and affidavit against any wages, or salary owing to any elective officer of this State whose salary is fixed by Section 19 of [1-F] of Article V of the State Constitution.

(g) Any fees received by a state agency under this section shall be deposited to the credit of the fund from which payments were, or would be, made on account of a garnishment under this section. For the purpose of this paragraph, payments from the State Pay Roll Revolving Fund shall be deemed payments made from the fund out of which moneys to meet such payments were transferred to said revolving fund."

These answering defendants further allege that there has never been any refusal or neglect on their part or either of them to pay any tax or to dis-

charge any liability in respect thereof to the plaintiff in intervention, but that in view of the prohibitions contained in Section 710, of the California Code of Civil Procedure, the defendant Dan O. Hoye, individually and as Controller of the City of Los Angeles did withhold the payment of the moneys demanded by the plaintiff in intervention and as Director of Internal Revenue, but at no time has he or the defendant City of Los Angeles refused to pay said sum over to the United States of America or the Director of Internal Revenue when said parties were entitled thereto.

III.

Answering paragraph 3, of said Complaint in Intervention these answering defendants in intervention do not have sufficient information or belief to properly answer the same and basing their answer on that ground deny generally and specifically each and every allegation contained therein.

IV.

Answering paragraph 5, of said complaint these answering defendants in intervention admit the allegations thereof [1-G] excepting the last sentence of said paragraph set forth on lines 19 and 20 of page 2 thereof, and with reference thereto they and each of them deny that interest accrues on said alleged tax liability at the daily rate of .02 until paid under the facts and circumstances of this case.

V.

Answering paragraph 6, of said Complaint in Intervention these answering defendants in intervention admit that a "Notice of Levy" was served upon the defendant in intervention, Dan O. Hoye, as Controller of the City of Los Angeles.

VI.

Answering paragraph 10, of said Complaint in Intervention these answering defendants in intervention deny generally and specifically each and every allegation contained therein; deny that they or either of them at any time refused to pay over or surrender the property, rights to property, moneys, credits or other obligations to the plaintiff in intervention, and allege that the money owing to the defendant in intervention, Richard A. Westberg, were withheld and are still withheld by the defendant in intervention, Dan O. Hoye, as Controller of the City of Los Angeles, in view of the provisions and prohibitions of California Code of Civil Procedure, Section 710, as hereinabove quoted.

Answer to Second Cause of Action

Answering the allegations contained in the Second Cause of Action of the Complaint in Intervention these answering defendants in intervention admit, deny and allege as follows:

I.

Answering paragraph numbered 11, of the Second Cause of Action these answering defendants in

intervention repeat and re-allege the applicable provisions and allegations contained in paragraphs 1, 2, 3, and 4, of their answer to the First Cause of Action. [1-H]

II.

These answering defendants in intervention admit paragraphs 12 and 13 of the Second Cause of Action.

III.

Answering paragraph 14, of the Second Cause of Action these answering defendants in intervention do not have sufficient information and belief to properly answer the same and basing their answer upon that ground deny generally and specifically each and every allegation contained therein; and allege that if by virtue of the serving of the Notice of Levy and Final Demand as alleged by the plaintiff in intervention constitutes a lien upon the money in the hands of these answering defendants in intervention earned by and belonging to the defendant Richard A. Westberg, that since these answering defendants are barred from the payment of said sum by Section 710, of the California Code of Civil Procedure, a conflict of laws resulted and does result from the service of said notices, and said conflict must be judicially determined before the defendant in intervention Dan O. Hoyer, as Controller of the City of Los Angeles is permitted to pay over said funds to the plaintiff in intervention without being personally liable to the defendant in intervention, Richard A. Westberg.

For A First Separate and Distinct Defense These
Answering Defendants In Intervention Allege
As Follows:

I.

That on or about March 19, 1957, Robert A. Riddell, acting on behalf of United States of America, and as Director of Internal Revenue, Sixth District, California, served upon the defendant in intervention, Dan O. Hoye, a "Notice of Levy" thereby claiming the sum of \$155.93 to be due and owing to the United States of America from the defendant in intervention Richard A. Westberg, who at said time was an employee of the [1-I] City of Los Angeles; that on said date the City of Los Angeles was indebted to the defendant Westberg in the sum of \$158.78, and said sum was then payable to said defendant; that due to the service of said notice the defendant Hoye withheld payment of any moneys to the defendant Westberg and thereafter on or about June 25, 1957, Robert A. Riddell as Director of Internal Revenue as aforesaid served upon the defendant Hoye a "Final Demand" thereby demanding said sum of \$155.93 be paid to him; that the defendant Hoye did not pay said sum of \$155.93 to the Director of Internal Revenue, or the United States of America, nor did he pay said sum to the defendant in intervention Westberg; that in view of the provisions and prohibitions contained in Section 710, of the California Code of Civil Procedure the defendant Hoye held said moneys in his possession and still retains the same, and that he stands

ready, able and willing to pay said sum of money being withheld from defendant Westberg or United States of America to any person or persons legally entitled thereto as determined by the above entitled court and concurrently with the filing of this Answer the defendant in intervention Hoyer will deposit the same with the Clerk of the above entitled court in order that said sum of money may be ordered to be paid to the person or persons legally entitled thereto; that these answering defendants in intervention have not, and at no time and do not now make any claim to said money or any part thereof except that in his capacity as a public official required to observe and comply with the Constitution and Laws of the State of California, the defendant in intervention Dan O. Hoyer seeks to pay the moneys now in his possession only to the person or persons legally entitled thereto, so that he may be discharged from his liability as custodian of said money; that to pay said sum of money to the plaintiff in intervention, United States of America, or the Director of Internal Revenue without the proper authority of a court of competent jurisdiction would be in violation of [1-J] Section 710 of the California Code of Civil Procedure, and would cause the defendant in intervention Dan O. Hoyer, to be personally liable for any moneys so paid.

For A Second Separate And Distinct Defense These
Answering Defendants In Intervention Allege
As Follows:

I.

Repeats and re-alleges paragraph 1, of their Second Separate and Distinct Defense hereinabove stated, the same as though fully set forth herein.

II.

That since there appears to be and is a conflict of laws as to the person or persons entitled to the moneys now being withheld by the defendant Dan O. Hoyer, as Controller of the City of Los Angeles, said defendant Hoyer instituted an action in the above entitled court, entitled "Dan O. Hoyer, as Controller of the City of Los Angeles, and Dan O. Hoyer, Plaintiffs, vs. The United States of America, Robert A. Riddell, Director of Internal Revenue, and Richard A. Westberg, Defendants. Civil Action No. 1065-57-T." said complaint entitled "Complaint to Quash a "Notice of Levy" and "Final Demand" Served On a Municipal Corporation By The Director of Internal Revenue." said complaint having been filed on September 10, 1957, a copy thereof being attached hereto marked "Exhibit A" and made a part hereof the same as though fully set forth herein. That thereafter the defendants United States of America and Robert A. Riddell did on or about November 12, 1957, file their Notice of Motion to Dismiss and Motion to Dismiss and supporting memorandum, together with a Notice of Motion to Intervene and Motion to Intervene, of the United States of America, a copy of the proposed Complaint in Intervention for Penalty under

Section 63.32 (b) of the 1924 Internal Revenue Code being attached to the Notice of Motion to Intervene. That on or about February 6, 1958, after argument by counsel of the respective parties the Honorable [1-K] Ernest A. Tolin, Judge of the above entitled court entered an order granting the defendants Motion to Dismiss and granting said defendants Motion to Intervene and that the order permitting Intervention by the United States of America was signed on said date. That thereafter on February 24, 1958, a copy of a Complaint in Intervention for Penalty under Section 63.32 (b) of the 1954 Internal Revenue Code was served upon the defendant in intervention Dan O. Hoyer; that on or about February 25, 1958, a further Amended Complaint in Intervention for Foreclosure of Internal Revenue Tax Lien Against Personal Property was served upon these answering defendants in intervention and on March 6, 1958, a "Summons on Amended Complaint in Intervention" was served upon these answering defendants by the plaintiff in intervention the United States of America; that thereafter on March 10, 1958, the Honorable Ernest A. Tolin, as Judge of the above entitled court signed an order "Granting Motion to Dismiss" in words as follows:

"Good Cause Appearing Therefor, it is hereby ordered that the complaint in the above entitled action may be, and it hereby is, dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, United States of America and Robert A. Riddell; however, this

is not a final order under Fed. R. Civ. P. 54 (b), since the United States of America has filed its complaint in intervention."

a copy of said order being attached hereto marked "Exhibit B" and made a part hereof the same as though fully set forth herein; that on March 11, 1958, these answering defendants in intervention received notice that the order granting Motion to Dismiss said case had been entered on March 10, 1958.

III.

On March 17, 1958, the defendant in intervention [1-L] Dan O. Hoyer, as Controller of the City of Los Angeles and Dan O. Hoyer, as plaintiffs in the above described action filed their "Notice of Appeal" to the United States Court of Appeals for the Ninth Circuit from the Order Granting Motion to Dismiss entered in the above entitled action on March 10, 1958, and thereafter filed their cost bond on appeal and the designation of record on appeal; that said appeal is now pending before the United States Circuit Court of Appeals, Ninth Circuit.

IV.

That on or about the 25th day of March 1958, Dan O. Hoyer as Controller of the City of Los Angeles as defendants in intervention in this proceeding applied to the Honorable Ernest A. Tolin, Judge of the above entitled court, for an order extending time to answer the complaint in intervention filed

by the United States of America; that said application was made on the ground that an appeal to the United States Circuit Court of Appeals is pending in said matter, said appeal being made to determine whether or not the United States District Court has jurisdiction of the complaint originally filed by the defendant Dan O. Hoyer and that the dismissal of said complaint by said court as hereinabove alleged was error; that the application of said defendants in intervention was summarily denied and that this answer is filed as a result of said denial of an extension of time to answer the complaint in intervention herein; that no such answer should have been required until the appeal has been determined.

For A Third Separate And District Defense These
Answering Defendants In Intervention Allege:

I.

That the complaint of the plaintiff in intervention does not state facts sufficient to constitute a cause of action against these answering defendants in intervention in that:

(a) At the time the complaint in intervention [1-M] was permitted to be filed a prior complaint was on file in the above entitled action wherein these answering defendants in intervention were plaintiffs and the plaintiffs in intervention were defendants and that the court had jurisdiction of the parties and the subject matter concerned in said com-

plaint and it was therefore error to permit the filing of the complaint in intervention.

(b) That the above entitled court by its own ruling and order signed and dated March 10, 1958, attached hereto marked "Exhibit B" expressly declares that said court does not have jurisdiction of the subject matter herein nor jurisdiction of the persons herein, and that said lack of jurisdiction was not cured by ordering a dismissal of the complaint originally filed by these answering defendants in intervention nor by permitting the filing of a complaint in intervention.

Wherefore, these answering defendants in intervention pray:

1. That the plaintiff in intervention take nothing by reason of its complaint in intervention on file herein;
2. That said complaint be dismissed for failure to state facts sufficient to constitute a cause of action against these answering defendants in intervention;
3. That the original complaint of the plaintiffs, Dan O. Hoyer, as Controller of the City of Los Angeles and Dan O. Hoyer, be reinstated herein and that the defendants the United States of America and Robert A. Riddell, Director of Internal Revenue, and Richard A. Westberg, be ordered to answer said complaint;

4. For its costs incurred herein and for such other and further relief as to the court seems just.

ROGER ARNEBERGH,

City Attorney,

BOURKE JONES,

Assistant City Attorney,

ALFRED E. ROGERS,

Assistant City Attorney, [1-N]

/s/ By T. PAUL MOODY,

Deputy City Attorney,

Attorneys for Plaintiffs.

[Note: Exhibit "A"—"Complaint to Quash a 'Notice of Levy' and 'Final Demand' served on a Municipal corporation by the Director of Internal Revenue" is set out at pages 3-7 of Cause No. 15964.]

[Note: Exhibit "B"—"Order Granting Motion to Dismiss" is set out at page 27 in Cause No. 15964.]

Duly Verified. [1-U]

Affidavit of Service by Mail Attached. [1-V]

[Endorsed]: Filed April 14, 1958.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed as follows, by and between the parties hereto, through their respective counsel, without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith and without prejudice to their right to object to the materiality, relevancy, or competency of any of the following facts agreed to; and it is further stipulated and agreed that any instrument or document referred to herein as Document #, or a photo reproduction thereof, may be introduced into evidence without any foundation being laid as to authenticity, [2] without prejudice to the right of any party to object to the competency (except as hereinabove provided), materiality, or relevancy thereof:

1. The United States of America is a sovereign and corporate body politic;

2. Intervention in this action was directed by the Attorney General of the United States and authorized and sanctioned by a delegate of the Secretary of the Treasury of the United States;

3. Defendant in intervention Dan O. Hoye is the duly elected, qualified, and acting Controller of the City of Los Angeles, California;

4. Defendant in intervention City of Los Angeles is a municipal corporation of the State of California;

5. On the 15th day of August, 1956, a delegate of the Secretary of the Treasury of the United States assessed federal income taxes for the calendar year 1955 and penalties and interest thereon in the aggregate amount of \$150.63 against the defendant in intervention and taxpayer Richard A. Westberg. On or about August 20, 1956, notice thereof was given to, and demand for the payment of said assessed taxes, penalties and interest was made upon said taxpayer; but notwithstanding notice and demand, no part of said tax, penalties and interest has been paid and the whole remains assessed, outstanding and unpaid. Interest accrues on said tax liability at the daily rate of \$.02 until paid.

6. On March 19, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon said Dan O. Hoyer a Notice of Levy, Document #1, in the sum of \$155.93, upon all property and rights to property belonging to the aforesaid taxpayer.

7. On June 25, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon said Dan O. Hoyer [3] a Final Demand, Document #2, for the amount set forth in the Notice of Levy, \$155.93.

8. On the dates of service of said Notice of Levy and Final Demand, as aforesaid, the defendant in intervention Richard A. Westberg was an employee of the defendant in intervention City of Los Ange-

les, and said City was indebted to said Richard A. Westberg in the sum of \$158.78.

9. Upon receipt of the Notice of Levy as aforesaid, defendant in intervention Dan O. Hoye, as Controller of the City of Los Angeles, did not pay said sum to said Richard A. Westberg.

10. The defendant in intervention Dan O. Hoye at the time of service of said Notice of Levy and at the time of service of said Final Demand, as aforesaid, would not and has refused to pay over or surrender the property, rights to property, monies, credits, and other obligations owing to the defendant in intervention Richard A. Westberg, which were in his possession as aforesaid at the time of service of said Notice of Levy and Final Demand upon him.

11. If defendant in intervention Dan O. Hoye were called to testify at the trial of this action, he would testify that he did not comply with the Notice of Levy and Final Demand, as hereinabove set forth in paragraph 10, because of Section 710 of the California Code of Civil Procedure.

12. Section 710 of the California Code of Civil Procedure provides in pertinent part as follows:

“§710. [Enforcement of judgment against debtor to whom money is owed by state, county etc.: Procedure.] (a) Whenever a judgment for the payment of money is rendered by any court of this State against a defendant to whom money is owing and

unpaid by this State or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may file a duly authenticated [4] abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

* * * * *

“2. If such money, wages or salary is owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or transcript, as will satisfy in full or to the greatest extent

the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor." [5]

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,
ROBERT H. WYSHAK,
Assistant U. S. Attorney,
/s/ ROBERT H. WYSHAK,
Attorneys for Plaintiff in
Intervention.

ROGER ARNEBERGH,
City Attorney,
BOURKE JONES,
Assistant City Attorney,
ALFRED E. ROGERS,
Assistant City Attorney,
T. PAUL MOODY,
Deputy City Attorney,
/s/ T. PAUL MOODY,
Attorneys for City of Los Angeles and Dan O. Hoye. [6]

[Endorsed]: Filed July 25, 1958.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This action arises under the Internal Revenue Code and involves the right of the United States to proceed against a municipal corporation as an employer for the collection of unpaid revenues owed by a delinquent taxpayer who is also an employee of the municipal corporation. [7]

The United States, not needing the aid of court procedure in such a circumstance, served a notice of levy and final demand upon the City of Los Angeles as the employer of a delinquent taxpayer for payment of his right to accrued wages due and owing by the City. In order to prohibit such action, the Controller of the City of Los Angeles brought a primary action for an injunction which also sought a declaratory judgment to quash the notice of levy and final demand made upon the City. The United States then intervened as a party plaintiff against Dan O. Hoyer, the Controller of the City of Los Angeles, and Richard A. Westberg, the delinquent taxpayer, as parties defendant, for the recovery of the monies alleged due under the Internal Revenue Code.

The motion by the United States to dismiss the complaint against it in the primary action was granted by this Court. This was done because the cause of action as stated in the primary complaint requests certain injunctive relief which is specifically prohibited by Section 7421 of Title 26, U. S. C.

(Internal Revenue Code of 1954.) Furthermore, such action is in the nature of declaratory relief which is also specifically prohibited by Section 2201 of Title 28, United States Code. An appeal was made from the granting of the Motion to Dismiss and is presently pending before the Appellate Court. However, the suit in intervention brought by the United States is still before the court and constitutes the only matter currently under consideration.

Using its right as a sovereign, the United States asserts its right to declaratory relief to the problem at hand even though such right is not available to plaintiffs. The ethics of prohibiting the subject of [8] a sovereign from utilizing a particular procedure in bringing a matter of litigation before the Court even though the sovereign, the Federal Government here, may do so, is for the consideration of a different authority than this Court. Seeking merely to follow the law as it is found, this Court granted the Order Permitting Intervention by the United States of America, and consequently opened a door for the Federal Government which had been locked by statute against the plaintiff, a private litigant.

The salient facts are as follows:

Richard A. Westberg, a defendant in intervention, was an employee of the City of Los Angeles and was delinquent in his payments of Federal income tax. An assessment was made against him which gave rise to a lien upon all accrued wages due him by his employer (to the extent of the delin-

quency) and a levy was served upon Dan O. Hoyer, the Controller of the City of Los Angeles, also a defendant in intervention, for the sum of \$155.93 against any accrued wages owed to Westberg. At that time the City owed Westberg \$158.78, a sum slightly in excess of the levy. Hoyer, however, refused to honor the levy, taking the position that the United States was required to comply with certain procedures set forth in the California Code of Civil Procedure relating to judgment creditors. Denying that the United States must comply with a state statute and become a judgment creditor in order to collect its revenue, the United States brought its complaint in intervention, first against Hoyer as an individual to collect the penalty provided for failure to honor the levy [as found in § 6332(b) of the 1954 Internal [9] Code], and second against Hoyer as a representative of the City to foreclose the tax lien as asserted against Westberg.

The basic issue was agreed by all appearing¹ parties to be whether the collection procedures of the Internal Revenue officials in the collection of monies past due under the Internal Revenue laws may be enforced uniformly without regard to conditions prescribed by a state legislature for judgment creditors.

The California statute involved,² stripped of portions non-essential to this case, reads:

¹ Although named as a party and served in the case, Richard A. Westberg never entered an appearance in the litigation.

² California Code of Civil Procedure, Section 710.

“(a) Whenever a judgment for the payment of money is rendered by any court of this State or by any county, city and county, city or municipality, quasi-municipality or public corporation, the judgment creditor may file a duly authenticated abstract or transcript of such judgment together with an affidavit stating the exact amount then due, owing and unpaid thereon and that he desires to avail himself of the provisions of this section in the manner as follows:

* * * * *

“(2) If such money, wages or salary is [10] owing and unpaid to such judgment debtor by any county, city and county, city or municipality, quasi-municipality or public corporation, said judgment creditor shall file said abstract or transcript and affidavit with the auditor of such county, city and county, city or municipality, quasi-municipality or public corporation (and in case there be no auditor then with the official whose duty corresponds to that of auditor). Thereupon said auditor (or other official) to discharge such claim of such judgment debtor shall pay into the court which issued such abstract or transcript by his warrant or check payable to said court the whole or such portion of the amount due on such claim of such judgment debtor, less an amount equal to one-half the salary or wages owing by the county, city and county, city, municipality, quasi-municipality, or public corporation to the judgment debtor for his personal services to such public body rendered at any time within 30 days next preceding the filing of such abstract or

transcript, as will satisfy in full or to the greatest extent the amount unpaid on said judgment and the balance thereof, if any, to the judgment debtor.

* * * * *

“(c) Whenever a court receives any money hereunder, it shall pay as much thereof as is not exempt from execution under this code to the judgment creditor and the balance thereof, if any, to the judgment debtor.” [11]

The quick answer to the question raised by the stated issue is that the California statute applies by its terms to “* * * a judgment for the payment of money * * * rendered by any court of this State.” [California]

The statute does not relate to any type of obligation except “a judgment for payment of money.”³ None of the other cited California statutes⁴ refer to the type of obligation the United States sought to enforce in this instance.

It is only by reason of the municipal official (Controller Hoyer) inferring something new into the statute that the problem arises at all. The Controller’s position certainly is not based upon the language of any cited statute.

The Internal Revenue Code of 1954, 26 U.S.C., is very specific as to certain methods of tax collection available to the Secretary of the Treasury or his delegate. In part the Code provides:

³ Apparently only a judgment of a California Court, Sec. 710 California Code of Civil Procedure.

⁴ Secs. 304, 371 and 374, Charter of the City of Los Angeles (California Stats. 1925).

“§ 6331. Levy and distraint

“(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the [12] Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer as defined in section 3401(d) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

“§6332. Surrender of property subject to levy

“(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his dele-

gate, except such part of [13] the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

“(b) Penalty for violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

“(c) Person defined.—The term ‘person,’ as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.”

The City of Los Angeles is a Municipal Corporation. Section 6332(c) quoted above makes no distinction in its applicability to different classes of corporations. That this type of statute is valid, appears clearly from the following language of the Supreme Court.⁵

“The act is a law of the United States [14] made in pursuance of the Constitution and, therefore, the supreme law of the land, the Constitution or laws of the states to the contrary notwithstanding. When-

⁵ Florida v. Mellon, 273 U.S. 12, at 17 (1927).

ever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield * * *.”⁶

The contention by Hoye that the enforcement of the levy and final demand would cause him to be personally liable to the municipal employee for any money paid pursuant thereto is without merit. Payment to the Government pursuant to such a levy is a complete defense against any action brought against the debtor on account of the debt. In 1955, it was said by the Court of Appeals for [15] the Fourth Circuit:⁷

“* * * The effect of the federal taxing statutes to which we have referred is to create a statutory attachment and garnishment in which the service of notice provided by statute takes the place of the court process in the ordinary garnishment proceeding. * * * The service of such notice results in what is virtually a transfer to the government of the in-

⁶ The “act” in *Florida v. Mellon* refers to Sec. 301 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 69-70, and reads as follows:

“The tax imposed by this section shall be credited with the amount of any estate, inheritance, legacy, or succession taxes actually paid to any State or Territory or the District of Columbia, in respect of any property included in the gross estate. The credit allowed by this subdivision shall not exceed 80 per centum of the tax imposed by this section, and shall include only such taxes as were actually paid and credit therefor claimed within three years after the filing of the return required by section 304.”

⁷ *United States v. Eiland*, 223 F.2d 118, at 121-122. See also, *Bank of Nevada v. United States*, 251 F.2d 820 (9 Cir. 1957).

debtedness, or the amount thereof necessary to pay the tax, so that payment to the government pursuant to the levy and notice is a complete defense to the debtor against any action brought against him on account of the debt. * * *”

Defendant in intervention, Dan O. Hoyer, has deposited with the Clerk of the Court a payroll check payable to Richard A. Westberg. This was done without benefit of any order of Court. The Clerk of this Court is not the Secretary or his delegate referred to in the quoted statute. The Clerk is directed to return said check to its maker, and Findings of Fact, Conclusions of Law and Judgment shall be prepared by the United States Attorney as prayed for in the Complaint in Intervention.

Dated: This 11th day of December, 1958.

/s/ ERNEST A. TOLIN,
U. S. District Judge. [16]

[Endorsed]: Filed December 11, 1958.

[Title of District Court and Cause.]

NOTE TO THE MEMORANDUM OF DECISION

In the Memorandum deciding this case, the Court said:

“Using its right as a sovereign, the United States asserts its right to declaratory relief to the problem at hand even though such right is not available to plaintiff.”

This language has offended the Government's Attorney who, [17] upon receiving the Memorandum, immediately protested that the United States had not asked for declaratory relief in its Amended Complaint in Intervention. As far as pleading nomenclature is concerned this contention is true. However, in substance it is somewhat inaccurate. The Amended Complaint in Intervention prayed judgment against the Defendant in Intervention Dan O. Hoyer in his own person and estate alleging that Hoyer had disregarded a notice of levy upon the property of the taxpayer Westberg. Plaintiff also sought foreclosure of its tax lien against the debt owed the taxpayer and Defendant in Intervention. In other words, it asked for a money judgment. There was no prayer for declaratory relief. When the motion to dismiss plaintiff's original Complaint was heard, counsel for the Government asserted that although Plaintiff Hoyer could not maintain a declaratory relief action, the Government agreed that the controversy was one upon which there should be a declaration of the rules governing exactly this type of apparently frequently recurring situation in which the Federal Government gives a notice of levy upon a municipal employee's earnings. Government counsel then stated that the Government would itself intervene to the end that there might be a declaration of rights. The Court, accordingly, undertook in its Memorandum to make its declaration; but it should be noted that this was incidental to the strict actions at law pleaded, the First Action At Law being for penalty, and the Second (in which

the taxpayer was named a party defendant) for foreclosure of Internal Revenue tax lien against personal property.

Dated: This 12th day of December, 1958.

/s/ ERNEST A. TOLIN,
U. S. District Judge. [18]

[Endorsed]: Filed December 12, 1958.

[Title of District Court and Cause.]

ADDENDUM TO THE MEMORANDUM OF DECISION

A second addendum to the Memorandum of Decision becomes necessary because proposed findings of fact, conclusions of law and judgment point up an important facet of the controversy which was not fully developed at the trial or then fully appreciated or definitively ruled upon [19] by the trial Judge. The case was litigated principally upon the issue of whether the United States in giving a Notice of Levy to secure payment of delinquent income tax upon the monies, credits, etc. due a Municipal employee and in possession of a Municipal government was obligated to proceed as an ordinary creditor. The Court is satisfied that its decision of this element of the case as set forth in the Memorandum of Decision is valid.

At the time of trial and decision it appeared that the contention was that Section 6332 of Title 26,

United States Code, simply had the effect of fixing liability for the tax and interest upon defendant Hoyer should the United States fail to collect the tax owed by defendant in intervention Richard A. Westberg by reason of Hoyer's failure or refusal to honor the levy. It should be said that the Amended Complaint in Intervention does not exclude the theory that Hoyer, the City Controller, is subject to a pure penalty. At the trial such a theory was not argued. Liability to the extent of a loss occasioned by failure to honor a levy seemed to be the reasonable result to visit upon the City Controller. It did not occur to the Court, nor did counsel suggest, that the sovereign was intending to penalize the Controller of the City of Los Angeles because he had sought to clarify a legal situation which was to him unclear. The proposed Judgment quite properly and clearly undertakes to collect the amount of the tax with interest and costs by way of foreclosure of the tax lien against the debt owed by the City of Los Angeles to the taxpayer and defendant in intervention Richard A. Westberg. There is no quarrel with the findings and conclusions tendered as to this cause of action. [20]

It is now clear that in addition to that relief, the United States seeks a penal judgment against defendant Dan O. Hoyer in his person and estate in the sum of \$155.93 together with interest and costs at the rate of six percent per annum. This is not sought as indemnification because of ultimate failure of the levy to reach the taxpayer's wages but is sought purely as a penalty. The wages have not been

paid and the foreclosure of the lien thereon should apply them to payment of taxes by mere execution of the judgment filed herewith. The statute in question¹ reads in pertinent part:

“Surrender of property subject to levy

“(a) Requirement.—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

“(b) Penalty for violation.—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon [21] demand by the Secretary or his delegate shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

“(c) * * * Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat. 784.”

There is doubt whether Congress intended to provide a true penalty or whether it intended to only place a responsibility upon one who disregarded a

¹ Secs. 6332(a) and 6332(b), Title 26, U.S.C.

levy and such disregard would lead to loss by the United States of the funds levied upon. In this connection it is noteworthy that Sec. 6332(b) of Title 26, U.S.C., although titled "Penalty for violation," does not use the word "penalty" in any of the operative language of the statute. The failure to definitively state within the operative language of the statute that a penalty is prescribed at least creates an ambiguity which should be resolved in favor of the officer from whom the penalty is demanded. This follows from application of the general consideration Courts give credit in situations wherein a penalty is sought. It does not necessarily follow that because the word "penalty" appears in a paragraph title, that penalty will be inferred into the body of the statute from which its general context and obvious purport appears to be only remedial.

An Appellate Court has said:

"* * * [I]t is well settled that in the application of penalties 'all questions in [22] doubt must be resolved in favor of those from whom the penalty is sought.' Crawford Statutory Construction, Section 240, page 462."²

When the Supreme Court³ was considering the imposition of penalties under the Clayton Act, and was construing the wording of the statute, it said:

"* * * Decisions of this Court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of

² Hatfried, Inc. v. Commissioner of Internal Rev., 162 F.2d 628, at 633 (6th Cir. 1947).

³ Van Camp & Sons v. Am. Can Co., 278 U.S. 245, at 253, 254 (1928).

circumstances apart from the plain language used are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity, *United States v. Goldenberg*, 168 U.S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole. *Ozawa v. United States*, 260 U.S. 178, 194 * * *

An offense to the moral sense, created by imposing a [23] penalty against one who is acting in good faith in testing the claim upon which the penalty against one who is acting in good faith in testing the claim upon which the penalty is based, is astutely put in *Anuchick v. Transamerica Freight Lines*,⁴ when, in view of a mandatory (by exact language of statute) imposition of a penalty under the Fair Labor Standards Act, it was said:

“* * * [I]t would be manifestly unfair to expect a business man to come to a conclusion on what these two laws meant when read together, under pain of heavy penalty if he didn't guess right. * * *

“Furthermore, under our decisions the law must be clear in order to exact the penalty in a civil case. Here the act is both penal and remedial but the effect is not clear. * * *⁵”

⁴ 46 Fed. Supp. 861, at 866-867 (D.C. Mich. 1942).

⁵ The business man's real problem with apparently conflicting statutes was acute in *Anuchick*. To the Court, the problem regarding validity of the levy method of collection, and exemption of the Director from the requirements of Sec. 710, C.C.P., was simple. Penal liabilities, however, are not levied because what is clear to one man is confused to another.

It is impressive that in imposing penalties in other areas of taxation, they are only assessed upon a showing of reasonable cause or in some aggravated [24] circumstance. In construing the terms of an Amendment to the Revenue Act of 1934 requiring that imposition of penalty in the case of failure to make and file a return was not to be made except upon reasonable cause, the Court resolved all reasonable doubts in favor of the taxpayer.⁶ In a tax situation, although under a different act, the Court of Appeals for the Sixth Circuit has held that reliance by the taxpayer upon the advice of counsel constituted reasonable cause even though the advice was founded upon mistake or ignorance of the law.⁷ In its decision the Court stated:

“Courts are reluctant to construe a statute so as to impose a penalty, unless there has been a substantial delinquency. * * *”

In dealing with a criminal action under the Internal Revenue Laws, the Supreme Court stated:⁸

“* * * It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the deficiency of tax and its collection with interest for the delay. * * *” [25]

⁶ *Hatfried, Inc. v. Commissioner of Internal Rev.*, *supra*.

⁷ *Dayton Bronze Bearing Co. v. Gilligan*, 281 F. 709, at 714 (6th Cir. 1922).

⁸ *Spies v. United States*, 317 U.S. 492, at 496 (1942).

The present case has all the earmarks of a Municipal government honestly undertaking to find the pathway by which it may safely proceed in a frequently recurring situation. The case is devoid of any flaunting of Federal Law. The City Controller sought judicial declaration first by filing an action in the District Court by way of a Complaint which is titled, "Complaint To Quash A 'Notice of Levy' And 'Final Demand Served On A Municipal Corporation By The Director Of Internal Revenue.'" That action was dismissed by the Court for want of jurisdiction. The United States then intervened, although the word "intervened" is tortured by use of a reference to what was done here. Intervention is conventionally had only in a viable action. In this case the United States had successfully procured dismissal of the Controller's Complaint. After the Controller filed his action (which was subsequently dismissed) he artlessly and ineffectively, except as evidence of good faith, undertook to invest the action with some of the qualities of interpleader. The current payroll check of the delinquent taxpayer, Richard A. Westberg, was deposited by the Controller with the Clerk of this Court.⁹ On May 22, 1958, the Clerk of Court issued his receipt for said payroll check and held the check until the [26] Memorandum of Decision in this case directed its return to the City Controller. The Controller still holds the

⁹ What was deposited was simply the payroll check, payable to Richard A. Westberg, apparently handed to the Clerk as it would have been delivered to Westberg were it not for the levy.

wages of Westberg. Under these circumstances it cannot be said that the City Controller was acting arbitrarily or with a desire or purpose to aid the delinquent taxpayer in avoiding his taxes. Although the action was dismissed, it was brought by the Controller to test the applicability of a California statute¹⁰ and procure a judicial determination in an area of official conduct. The case is far different from *Sims v. United States*.¹¹ In that case the State Auditor refused to honor levies of the kind involved here and instead issued and delivered payroll warrants to the taxpayers for their then accrued net salaries. The State Auditor thereby flaunted and defeated the levy. The language, and spirit, of the statute held him liable in his person and estate. This does not shock the conscience, nor is it an intemperate infliction of punishment. It simply visited upon him the natural result of the risk he took by his wilful disregard of the levy and made the Government whole in that particular transaction. It was not punishment but indemnification. In the instant case the Controller of the City of Los Angeles merely sought to obtain judicial direction as to what he should do. He maintained the funds in status quo and even attempted to deposit the money in Court. His legal methods were in error but he did not defeat the levy by paying the funds [27] to the delinquent taxpayer. His good faith is apparent. Judgment foreclosing the tax lien will collect the tax.

¹⁰ Sec. 710, Code of Civil Procedure.

¹¹ 27 U.S.L. Week, 4207.

Under these circumstances there should not be a penalty beyond the interest and costs.

Because the Findings of Fact, Conclusions of Law and Judgment submitted by the United States Attorney are so at variance with the Court's views, the Court has re-drafted these documents and directs that they be filed herewith.

Dated: This 22nd day of April, 1959.

/s/ ERNEST A. TOLIN,

U. S. District Judge. [28]

[Endorsed]: Filed April 22, 1959.

In The United States District Court, Southern
District of California, Central Division

No. 1065-57-T Civil

DAN O. HOYE, as Controller of the City of Los
Angeles, and DAN O. HOYE,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, ROB-
ERT A. RIDDELL, Director of Internal Rev-
enue, and RICHARD A. WESTBERG,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff in Intervention,

vs.

DAN O. HOYE, et al.,

Defendants in Intervention.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled matter having come on for trial before the Honorable Ernest A. Tolin, United States District Judge, presiding without a jury, the plaintiff in intervention represented by its counsel, Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United [29] States Attorney, Chief, Tax Division, and Robert H. Wy-

shak, Assistant United States Attorney, and the plaintiff and defendant in intervention Dan O. Hoyer and the defendant in intervention City of Los Angeles, represented by their attorneys, Roger Arnebergh, City Attorney, Alfred E. Rogers, Assistant City Attorney, and T. Paul Moody, Deputy City Attorney, and the defendant in intervention Richard A. Westberg having been defaulted, after having been duly served the summons and complaint in intervention and he having failed to respond or plead thereto, and the defendants United States of America and Robert A. Riddell having moved to dismiss the complaint for lack of jurisdiction, and the Court having entered its order so dismissing the complaint and the Court having tried the intervention case upon the issues joined by the amended complaint in intervention and answer thereto and having considered the stipulation of facts, memoranda, and argument of counsel, makes its findings of fact and conclusions of law as follows:

Findings of Fact

I.

The United States of America is a sovereign and corporate body politic.

II.

Intervention in this action was directed by the Attorney General of the United States and authorized and sanctioned by a delegate of the Secretary of the Treasury of the United States.

III.

Defendant in intervention Dan O. Hoye is the duly elected, qualified and acting Controller of the City of Los Angeles, California. [30]

IV.

Defendant in intervention City of Los Angeles is a municipal corporation of the State of California.

V.

On the 15th day of August, 1956, a delegate of the Secretary of the Treasury of the United States assessed Federal income taxes for the calendar year 1955 and penalties and interest thereon in the aggregate amount of \$150.63 against the defendant in intervention and taxpayer Richard A. Westberg. On or about August 20, 1956, notice thereof was given to, and demand for the payment of said assessed taxes, penalties and interest was made upon, said taxpayer; but notwithstanding notice and demand, no part of said taxes, penalties and interest has been paid and the whole remains assessed, outstanding and unpaid. Interest accrues on said tax liability at the daily rate of \$.02 until paid.

VI.

On March 19, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon said Dan O. Hoye a Notice of Levy, in the sum of \$155.93, upon all property

and rights to property belonging to the aforesaid taxpayer.

VII.

On June 25, 1957, a delegate of the Secretary of the Treasury of the United States, pursuant to the provisions of the Internal Revenue Code of 1954, duly served upon said Dan O. Hoyer a Final Demand for the amount set forth in the Notice of Levy, \$155.93.

VIII.

On the dates of service of said Notice of Levy [31] and Final Demand, as aforesaid, the defendant in intervention Richard A. Westberg was an employee of the defendant in intervention City of Los Angeles, and by reason of said employment said City was indebted to said Richard A. Westberg in the sum of \$158.78.

IX.

The defendant in intervention Dan O. Hoyer at the time of service of said Notice of Levy and at the time of service of said Final Demand, as aforesaid, did not pay over or surrender to the plaintiff in intervention and its agents the property, rights to property, monies, credits, and other obligations owing to the defendant in intervention Richard A. Westberg, which were in his possession as aforesaid at the time of service of said Notice of Levy and Final Demand upon him. The defendant in intervention Dan O. Hoyer did not seek to avoid said Notice of Levy and Final Demand and did not

undertake to defeat the collection of taxes described but did contend and assert that the United States of America and Robert A. Riddell, Director of Internal Revenue, were required to proceed in accordance with Sec. 710 of the Code of Civil Procedure of the State of California. Defendant in intervention Dan O. Hoyer continued to hold the monies due Richard A. Westberg which were in Hoyer's possession at the time of the levy. Defendant in intervention Dan O. Hoyer in good faith and for the purpose of procuring a judicial declaration of the validity of his said contention, commenced an action in this Court. Ancillary thereto but without authority of any statute or rule of Court, said defendant in intervention Dan O. Hoyer delivered to the Clerk of Court the payroll check then owing to Richard A. Westberg in the amount of \$158.78. Said check was [32] payable to Richard A. Westberg. Upon Order of Court the Clerk returned said payroll check to defendant in intervention Dan O. Hoyer who now holds the same in his possession.

X.

None of the property or rights to property subject to the levy was at the time of levy and demand subject to an attachment or execution under any judicial process within the meaning of Sec. 6332(a) of the Internal Revenue Code of 1954.

XI.

Defendant in intervention Dan O. Hoyer is a "person" as defined by Sec. 6332(c) of said 1954 Code.

XII.

Every conclusion of law herein deemed to be a finding of fact is hereby found as a fact.

Conclusions of Law

I.

This Court has jurisdiction over the complaint in intervention and the parties thereto.

II.

This Court does not have jurisdiction of the subject matter of the complaint or over the United States of America as a defendant thereto.

III.

The deposit of defendant in intervention Richard A. Westberg's payroll check, by defendant in intervention Dan O. Hoyer, was not an effective compliance with the levy and final demand referred to in the foregoing finding of fact. It was not a valid interpleader. Said deposit was [33] made in good faith and in an effort to maintain the status quo of the monies then due defendant in intervention Richard A. Westberg until final determination of the contention that the United States must proceed in accordance with Sec. 710, California Code of Civil Procedure. Defendant in intervention Dan O. Hoyer attempted to surrender the property and rights to property subject to the levy by way of a deposit into this Court to be paid to the United

States if this Court determined that the law permitted the United States to collect the sum due from Richard A. Westberg without following the procedure described by said California Code Section. He is liable in his own person and estate to the United States in a sum equivalent to the value of the property which was the subject of the levy if by his delay in honoring the levy the monies primarily due Richard A. Westberg have become unavailable to the levy. He is not liable for a penalty because his actions have been in good faith and he sought only a judicial determination of his obligation in regard to the levy.

IV.

Plaintiff in intervention has a valid and subsisting lien for the delinquent tax liability for the year 1955 of the defendant in intervention Richard A. Westberg, which lien is upon all property and rights to property of said Richard A. Westberg, superior to the rights and claims of all the parties hereto.

V.

Section 710 of the California Code of Civil Procedure is not here relevant or applicable for the reason that Federal internal revenue statutes enacted pursuant to Constitutional grant are supreme and levies [34] thereunder are self executing and also because said statute relates only to a "judgment for payment of money".

VI.

Plaintiff in intervention is entitled to judgment under Sec. 7403 of said 1954 Code enforcing its said tax lien against the debt owed the taxpayer and defendant in intervention Richard A. Westberg by the defendant in intervention City of Los Angeles in the sum of \$158.78 and for its costs herein to be taxed by the Clerk of this Court.

VII.

Every finding of fact deemed to be a conclusion of law is hereby concluded as a matter of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed:

- 1) That the plaintiffs take nothing;
- 2) That the complaint be dismissed;
- 3) That under its first cause of action (penalty) the plaintiff in intervention take nothing; and
- 4) That under its second cause of action (foreclosure of lien) the plaintiff in intervention have judgment against the City of Los Angeles enforcing its tax lien against the debt owed to defendant in intervention Richard A. Westberg by the defendant in intervention City of Los Angeles in

the sum of \$158.78, and for its costs herein taxed by the Clerk of this Court in the sum of \$20.00 and that defendant in intervention City of Los Angeles is directed and ordered to issue and deliver [35] a check therefor to Robert A. Riddell, Director of Internal Revenue.

This Court retains jurisdiction to enter a Judgment against defendant Dan O. Hoyer in his own person and estate should the Judgment herein against defendant in intervention City of Los Angeles be not promptly paid upon its becoming final.

Dated: This 22nd day of April, 1959.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed and Entered April 22, 1959.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To The City of Los Angeles and Its Attorneys,
Roger Arnebergh, Bourke Jones, Alfred E.
Rogers, Ralph J. Eubank:

You, and Each of You, Will Please Take Notice
That:

Judgment in the above entitled case was docketed
and entered on April 22, 1959.

Dated: April 24, 1959. [37]

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division,
ROBERT H. WYSHAK,
Assistant U. S. Attorney,
/s/ ROBERT H. WYSHAK,
Attorneys for United States
of America. [38]

Certificate of Service by Mail Attached. [39]

[Endorsed]: Filed April 24, 1959.

[Note: Government's Exhibit No. 2—"Notice of Levy" and Exhibit No. 3—"Final Demand" are set out as Exhibits A and B in Cause No. 15964 at pages 7-11.]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America, Plaintiff in intervention, and to The United States of America, and Robert A. Riddell, Director of Internal Revenue, Defendants, and to Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, Chief Tax Division, and Robert H. Wyshak,

Assistant United States Attorney, Their Attorneys: [44]

You and Each of You Will Please Take Notice, that the Plaintiff, Dan O. Hoye, as Controller of the City of Los Angeles, and Dan O. Hoye, Plaintiffs above named, and Dan O. Hoye and the City of Los Angeles, a municipal corporation, defendants in intervention, do hereby give notice of and do hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment heretofore docketed and entered on April 22, 1959.

Dated: 17th day of June, 1959.

ROGER ARNEBERGH,

City Attorney,

BOURKE JONES,

Assistant City Attorney,

RALPH J. EUBANK,

Assistant City Attorney,

/s/ By T. PAUL MOODY,

Deputy City Attorney. [45]

Acknowledgment of Service Attached. [46]

[Endorsed]: Filed June 17, 1959.

[Title of District Court and Cause.]

STIPULATION FOR COSTS ON APPEAL

Know All Men By These Presents, That Fidelity and Deposit Company of Maryland, a Corporation organized and existing under the laws of the State

of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto United States of America in the penal sum of Two Hundred and Fifty and No/100 (\$250.00) Dollars, to be paid to said Plaintiff, his successors, assigns or legal representatives, for which payment well and truly to be made, the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns firmly by these presents.

The Condition of the Above Obligation Is Such, that whereas, Dan O. Hoyer and The City of Los Angeles is about to take an appeal to the United States Court of Appeals for the Ninth Circuit from a Judgment made and entered on April 22, 1959 by the United States District Court for the Southern District of California, Central Division, in the above entitled case.

Now, Therefore, if the above named appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against [copy missing] if [copy missing] fails to make good its appeal, then this obligation shall be void; otherwise to remain in full force and effect. [47]

It Is Further Agreed by the Surety, that in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, Sealed, and dated this 18th day of June, 1959.

FIDELITY AND DEPOSIT COM-
PANY OF MARYLAND,

/s/ By ROBERT HECHT,
Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ ROGER ARNEBERGH,
City Attorney,
/s/ By T. PAUL MOODY,
Deputy City Attorney.

Approved this 18th day of June, 1959.

/s/ ERNEST A. TOLIN,
Judge. [48]

Notary's Certificate Attached.

[Endorsed]: Filed June 18, 1959.

[Title of District Court and Cause.]

SUPERSEDEAS BOND, CASH (RULE 73 d.)

Whereas, Dan O. Hoyer, as Controller of the City of Los Angeles, and Dan O. Hoyer, Plaintiffs, and Dan O. Hoyer and the City of Los Angeles, a municipal corporation, Defendants in intervention, filed Notice of Appeal from the judgment heretofore entered and docketed in the above entitled action on April 22, 1959, and [50]

In lieu of the filing of a corporate surety supersedeas bond herein Roger Arnebergh, City Attorney, City of Los Angeles, does hereby deposit with the Clerk of the above-entitled court the sum of Two Hundred Dollars (\$200) cash, said deposit conditioned as follows:

The condition of this deposit is such that if said appellants shall pay and satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award, then this deposit shall be refunded to Roger Arnebergh, City Attorney, City of Los Angeles; that should said judgment together with costs, interest, and damages not be so paid then the United States of America is authorized and directed to proceed against said deposit pursuant to Rule 8 (c) of the above-entitled court, to satisfy and pay all of said items, and any balance remaining, if any, shall be refunded to Rober Arnebergh, City Attorney, City of Los Angeles.

The cash deposited herein is the property of the City Attorney Litigation Fund, City of Los Angeles; that Roger Arnebergh is the duly elected, qualified and acting City Attorney of the City of Los Angeles, California.

DAN O. HOYE and the CITY
OF LOS ANGELES,
/s/ By ROGER ARNEBERGH,
City Attorney. [51]

Subscribed and sworn to concerning statements as to ownership of fund before me this 18th day of June, 1959.

/s/ GENEVIEVE UPDEGRAFT,
Notary Public in and for the County of Los Angeles, State of California. My Commission Expires April 30, 1963.

Examined and recommended for approval as provided in Rule 8.

ROGER ARNEBERGH,
City Attorney,
/s/ By T. PAUL MOODY.

I hereby approve the foregoing and fix the supersedeas bond at said sum of \$200.00 cash.

Dated this 18th day of June, 1959.

/s/ ERNEST A. TOLIN,
United States District Judge.

Receipt of the sum of Two Hundred Dollars (\$200) cash is hereby acknowledged this day of June, 1959.

JOHN A. CHILDRESS,
/s/ By L. CONLIFFE,
Clerk, United States District Court, Southern District of California, Central Division. [52]

[Endorsed]: Filed June 18, 1959.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

(F.R.C.P. Rule 75 (a))

Pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, the Plaintiffs-Defendants in Intervention-Appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals, Ninth Circuit, taken by Notice of Appeal filed June 17, 1959, the following portions of the record and proceedings in this action:

(1) The Complaint of Plaintiffs filed herein September 10, 1957.

(2) Notice of Motion to Intervene and Motion to Intervene of the United States of America, together with copy of Complaint in Intervention for Penalty Under Section 6332 (b) of The 1954 Internal Revenue Code, attached thereto.

(3) Notice of Motions to Dismiss and Motions to Dismiss and Supporting Memorandum, together with the Supporting Memorandum of Points and Authorities attached thereto.

(4) Points and Authorities of the Plaintiff in Opposition to Motions to Dismiss by defendants United States of America and Robert A. Riddell, Director of Internal Revenue, and Motion to File [55] Complaint in Intervention.

(5) Minute Order entered by the Court on February 6, 1958, granting defendants' Motion to Intervene.

(6) Order permitting Intervention by the United States of America, dated February 6, 1957.

(7) Amended Complaint in Intervention, for Penalty and for Foreclosure of Internal Revenue Tax Lien Against Personal Property, together with the Summons attached thereto.

(8) Complaint in Intervention for Penalty filed February 21, 1958.

(9) Order granting Motion to Dismiss, dated March 10, 1958.

(10) Notice of Order granting Motion to Dismiss, dated March 10, 1958.

(11) Notice of Appeal filed herein on March 17, 1958.

*(See Note below.)

(12) Answer of certain defendants in intervention filed April 14, 1958.

(13) Stipulation of Facts on file herein.

(14) Memorandum of Decision signed by Hon. Ernest A. Tolin, United States District Judge dated [56] December 11, 1958.

(15) Notes to the Memorandum of Decision dated December 12, 1958.

(16) Addendum to the Memorandum of Decision dated and filed April 22, 1959.

* All items listed in Nos. 1 to 12 inclusive were designated on the prior appeal in the above entitled matter and are a part of the record now pending before the United States Court of Appeals, Ninth Circuit (In Case No. 15,964).

(17) Findings of Fact, Conclusions of Law and Judgment signed, dated and entered April 22, 1959.

(18) Notice of Entry of Judgment.

(19) Notice of Appeal filed June 17, 1959.

(20) Stipulation for Costs on Appeal filed June 18, 1959.

(21) Supersedeas Bond—Cash (Rule 73d) filed June 18, 1959.

(22) Notice of levy by Director of Internal Revenue, addressed to Dan O. Hoyer as Controller of the City of Los Angeles.

(23) Final Demand of the Director of Internal Revenue.

(24) This Designation of Record.

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

RALPH J. EUBANK,
Assistant City Attorney,

/s/ By T. PAUL MOODY,
Deputy City Attorney,
Attorneys for Plaintiff-
Appellants. [57]

Affidavit of Service by Mail Attached. [58]

[Endorsed]: Filed June 25, 1959.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL
(F.R.C.P. RULE 75 (d))

Plaintiffs-Defendants in Intervention-Appellants herein do hereby present the points upon which they claim the District Court erred:

(1) The Court erred in adjudging that the plaintiffs take nothing by reason of their complaint;

(2) The Court erred in adjudging that the complaint of Plaintiffs be dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants;

(3) That a conflict of laws exists by virtue of diverse judgments in the lower District Courts of the Southern District of California, Central Division, including the judgment rendered herein, which judgments create confusion and uncertainty in the minds of all public officials in the State of California, whose duties and responsibilities include the disbursing of public funds to employees of the State of California, and to employees of counties, cities and all other political subdivisions of said State;

That such conflict of laws must be resolved [62] to afford protection to all such public officials

thereby permitting a more efficient operation of government.

ROGER ARNEBERGH,
City Attorney,
BOURKE JONES,
Assistant City Attorney,
RALPH J. EUBANK,
Assistant City Attorney.

/s/ By T. PAUL MOODY,
Deputy City Attorney. [63]

Affidavit of Service by Mail Attached. [64]

[Endorsed]: Filed June 25, 1959.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

Page

1. Names and Addresses of Attorneys.

1-A to 1-V, incl. Answer of Certain Defendants in Intervention, filed 4/14/58.

2. Stipulation of Facts, filed 7/25/58.

Page

7. Memorandum of Decision, filed 12/11/58.
17. Note to the Memorandum of Decision, filed 12/12/58.
19. Addendum to the Memorandum of Decision, filed 4/22/59.
29. Findings of Fact, Conclusions of Law and Judgment, filed and entered 4/22/59.
37. Notice of Entry of Judgment, filed 4/24/59.
40. Notice of Levy (Marked as Govt's Exb. 2).
42. Final Demand (Marked as Govt's Exb. 3).
44. Notice of Appeal, filed 6/17/59.
47. (Certified copy) Stipulation for Costs on Appeal, filed 6/18/59.
50. (Certified copy) Supersedeas Bond, filed 6/18/59.
53. Designation of contents of record on appeal, filed 6/25/59.
60. Statement of Points on Appeal, filed 6/25/59.

Dated: July 23, 1959.

[Seal]

JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16553. United States Court of Appeals for the Ninth Circuit. Dan O. Hoyer, as Controller of the City of Los Angeles, Dan O. Hoyer and The City of Los Angeles, Appellants, vs. United States of America and Robert A. Riddell, Director of Internal Revenue, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: July 24, 1959.

Docketed: July 29, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Letterhead of Office of City Attorney, City Hall,
Los Angeles 12, California]

Office of the Clerk

August 24, 1959

U. S. Court of Appeals
For the Ninth Circuit
San Francisco 1, California

Re: Your No. 16553
Hoyer vs. U. S. A.

Dear Mr. O'Brien:

In reply to your letter of August 20, 1959, directing the attention of Mr. Moody to your Rule 17, the undersigned has reviewed the file in this office and notes that a Statement of Points on Appeal (F.R. C.P. Rule 75 (d)), and a Designation of Contents

of Record on Appeal (F.R.C.P. Rule 75 (a), was filed with the Clerk of the District Court here on June 25, 1959, and a copy of each of these documents mailed on the same date to Laughlin E. Waters, U. S. Attorney, and Edward R. McHale and Robert H. Wyshak, Assistant U. S. Attorneys at the Federal Building. I also note that as of July 23, 1959, John A. Childress, Clerk of the Court certified certain described documents to your Court, including the two documents described above.

We are satisfied with the documents as filed with the District Court and hereby adopt such above referred to statement of points and designation of record for the purposes of this appeal.

A copy of this letter will be mailed to the office of the U. S. Attorney here.

Thank you for your calling this matter to our attention.

Very truly yours,

ROGER ARNEBERGH,
City Attorney,

T. PAUL MOODY,
Deputy City Attorney,

/s/ By JOHN F. FELDMEIER,
Deputy City Attorney.

TPM:MR

cc—Laughlin E. Waters

United States Attorney

[Endorsed]: Filed August 25, 1959. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

No. 16553

DAN O. HOYE, as Controller of The City of Los
Angeles, and DAN O. HOYE,
Plaintiffs-Appellants,
vs.

UNITED STATES OF AMERICA, ROBERT A.
RIDDELL, Director of Internal Revenue, and
RICHARD A. WESTBERG,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff in Intervention-Appellee,
vs.

DAN O. HOYE, CITY OF LOS ANGELES and
RICHARD A. WESTBERG,
Defendants in Intervention,

DAN O. HOYE, CITY OF LOS ANGELES,
Defendants in Intervention-Appellants.

STIPULATION FOR USE OF RECORD AND
BRIEFS IN PRIOR APPEAL NUMBERED
15964

It Is Hereby Stipulated between Dan O. Hoyer, as Controller of the City of Los Angeles, and Dan O. Hoyer, Plaintiffs-Appellants, and Dan O. Hoyer, and City of Los Angeles, Defendants in Intervention, Appellants, and United States of America, Robert A. Riddell, Director of Internal Revenue, Defendants-Appellees, and the United States of

America, Plaintiff in Intervention, Appellee, by their respective counsel, that the record in the prior appeal numbered 15964, may be considered as a part of the record in the instant appeal numbered 16553, and

It Is Further Stipulated that the briefs in the prior appeal numbered 15964, may be considered in the instant appeal numbered 16553.

Dated: October 7, 1959.

ROGER ARNEBERGH,

City Attorney,

BOURKE JONES,

Assistant City Attorney,

RALPH J. EUBANK,

Assistant City Attorney,

T. PAUL MOODY,

Deputy City Attorney,

/s/ By T. PAUL MOODY,

Attorneys for Appellants.

/s/ CHARLES K. RICE (J.),

Assistant U. S. Attorney General, Tax Division,
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U. S. Attorney,

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Assistant U. S. Attorney,

Chief Tax Division,

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Assistant U. S. Attorney,

Attorneys for Appellees.

[Endorsed]: Filed October 15, 1959. Paul P. O'Brien, Clerk.

No. 16553

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles, and DAN
O. HOYE,

Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, ROBERT A. RIDDELL, Director of
Internal Revenue, and RICHARD A. WESTBERG,

Defendants-Appellees.

UNITED STATES OF AMERICA,

Plaintiff in Intervention-Appellee,

vs.

DAN O. HOYE, CITY OF LOS ANGELES and RICHARD A. WEST-
BERG,

Defendants in Intervention,

DAN O. HOYE, CITY OF LOS ANGELES,

Defendants in Intervention-Appellants.

Supplemental Brief of Plaintiffs-Appellants, Defendants in Intervention-Appellants.

ROGER ARNEBERGH,
City Attorney,

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*Attorneys for Plaintiffs-Appellants,
Defendants in Intervention-Appellants.*

FILED

NOV 30 1959

PAUL P. O'BRIEN, CLERK

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No. 16553

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles, and DAN
O. HOYE,
Plaintiffs-Appellants,

vs.

UNITED STATES OF AMERICA, ROBERT A. RIDDELL, Director of
Internal Revenue, and RICHARD A. WESTBERG,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff in Intervention-Appellee,
vs.

DAN O. HOYE, CITY OF LOS ANGELES and RICHARD A. WEST-
BERG,
Defendants in Intervention,

DAN O. HOYE, CITY OF LOS ANGELES,
Defendants in Intervention-Appellants.

Supplemental Brief of Plaintiffs-Appellants, Defendants in Intervention-Appellants.

Statement of Pleadings and Facts.

Pursuant to written stipulation by all parties appearing in the court below the record in prior appeal numbered 15964, and the briefs in said appeal numbered 15964, may be considered as a part of the record and as briefs on appeal in the instant appeal numbered 16553. Suffice to indicate that a complete statement of the pleadings and of the facts involved in this appeal is stated in the record in the prior appeal and the briefs in said appeal, and pur-

suant to said stipulation all the aforesaid records and briefs in appeal numbered ¹⁵⁹⁶⁴16553, are incorporated herein by reference and are made a part hereof the same as though fully set forth herein.

On March 2, 1959, the United States Court of Appeals for the Ninth Circuit made and filed its order in case numbered 15,964 reading as follows:

“IT IS HEREBY ORDERED that the order of submission heretofore filed by this court in the above numbered case of December 3rd, 1958, is vacated and the determination of this appeal held in abeyance pending the complete trial of the Government’s case in intervention, Civil No. 1065-57-T, in the court below and until such time as either an appeal is taken from the judgment in intervention, or the time for taking such an appeal expires and this court is formally advised of either fact”.

Thereafter, following the filing of said Order a trial on the merits was had in the court below and pursuant to written findings of fact and conclusions of law filed therein, the District Court for the Southern District of California, Central Division, Hon. Ernest A. Tolin, District Judge, made and filed his judgment therein on April 22, 1959, and notice of the entry thereof was given to Plaintiffs-Appellants-Defendants in Intervention-Appellants on April 24, 1959.

On June 17, 1959, Notice of Appeal was filed in said proceeding by the Appellants herein.

Points on Appeal.

(1) The District Court erred in adjudging that Plaintiffs take nothing by reason of their complaint. (See Statement of the Case in Brief of Appellant in Appeal No. 15,964 at pages 6-8, and Argument set forth in said Brief as Point I, pages 9-11).

(2) The District Court erred in adjudging that the complaint of plaintiffs in action numbered 1065-57-T, be dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants. (Said Point No. (2) is covered by all records and briefs on appeal in the First Appeal numbered 15,964).

(3) A conflict of laws and decisions exists by virtue of diverse judgments in the lower courts of the Southern District of California, Central Division, including the judgment rendered in case numbered 1065-57-T, which laws and decisions create confusion and uncertainty in the minds of all public officials in the State of California, whose duties include the dispersing of public funds to employees of the State of California and to employees of counties, cities and other political subdivisions of said state.

The case of Hoyer, Controller, vs. United States (S. D. Cal., 1953), 109 Fed. Supp. 685, came before the District Court in a motion of the United States of America and Robert A. Riddell, as Collector of Internal Revenue, to dismiss the complaint of the plaintiff who as City Controller of the City of Los Angeles is charged with the duty of paying salaries, pensions, to the employees of said city. (See discussion of said case in Brief of Appellant, Appeal No. 15,964 at pages 15-16). As noted in the aforesaid Brief on Appeal, the District Court recognizing

the dilemma of the Controller Hoyer under Section 710, California Code of Civil Procedure and the Internal Revenue Laws of the United States, denied the Motion to Dismiss, basing its denial upon the case of *Tomlinson v. Smith* (C. A. 7, 1942), 128 F. 2d 808, (See discussion of *Tomlinson* case in Brief of Appellant in Appeal numbered 15,964, at pp. 12-15.)

The District Court in the instant action numbered 1065-57, upon motion of the United States and Robert A. Riddell, Director of Internal Revenue, dismissed the complaint of the plaintiff below on the ground that the court lacked jurisdiction of the subject matter and lacked jurisdiction over the defendants United States of America and Robert A. Riddell.

It is apparent from the foregoing decisions of the District Courts, Southern District of California, Central Division, that a definite conflict of decisions exists which should be resolved by a determination of this court.

From the pleadings, records on appeal, and briefs on appeal herein setting forth the provisions of California Code of Civil Procedure Section 710, and the requirements thereunder that Hoyer pay moneys under his jurisdiction only to the payee or upon a certified abstract of ^athe final judgment, together with an affidavit furnished therewith showing the exact amount due the creditor, and the contrary provisions of the Internal Revenue Act of 1954 requiring the direct payment of taxes claimed by the Director of Internal Revenue, upon notice of levy with final demand, it is clear that a decision of this court is necessary to protect the appellant Hoyer and all other public officials similarly situated. The resolving of this dilemma will be a distinct benefit to the United States of America and the State of California, and all counties,

cities, and political subdivisions thereof. (See Memorandum and Points and Authorities in opposition to Motion to Dismiss by Defendants-Appellees in Appeal numbered 15,964, pp. 4-5, 7.)

Conclusion.

For the foregoing reasons it is submitted that the United States District Court committed error (1) in adjudging that the Plaintiffs take nothing by reason of their complaint; (2) and erred in adjudging that the complaint of plaintiffs be dismissed for lack of jurisdiction of the subject matter and for lack of jurisdiction over the defendants, and (3) that a conflict of laws and decisions exists and must be resolved thereby permitting a more effective inter-Governmental operation between the United States of America and its Department of Internal Revenue, and the State of California, including all counties, cities, and political subdivisions thereof.

Respectfully submitted,

ROGER ARNEBERGH,

City Attorney,

BOURKE JONES,

Assistant City Attorney,

RALPH J. EUBANK,

Assistant City Attorney,

By T. PAUL MOODY,

Deputy City Attorney,

Attorneys for Plaintiffs-Appellants,

Defendants in Intervention-Appellants.

No. 16553

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles,
DAN O. HOYE, and THE CITY OF LOS ANGELES,
Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL,
Director of Internal Revenue,
Appellees.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEES.

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FILED

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PAUL P. O'BRIEN, CLERK

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No. 16553

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DAN O. HOYE, as Controller of the City of Los Angeles,
DAN O. HOYE, and THE CITY OF LOS ANGELES,
Appellants,

vs.

UNITED STATES OF AMERICA and ROBERT A. RIDDELL,
Director of Internal Revenue,
Appellees.

On Appeal From the Judgment of the United States District
Court for the Southern District of California.

BRIEF FOR THE APPELLEES.

Opinions Below.

The opinions of the District Court [R. 61-79] are reported at 169 F. Supp. 474 and 172 F. Supp. 532.

Jurisdiction.

This appeal arises out of proceedings by the United States to collect 1955 income taxes due and owing from one Richard A. Westberg by levy upon his accrued salary in the hands of the controller, Dan O. Hoye, of the City of Los Angeles. The levy was served on March 19, 1957, and the final demand for payment was made on June 25,

1957. [R. 82-83.] On September 10, 1957, the controller, Dan O. Hoyer, filed in the District Court a complaint to quash the notice of levy and final demand, naming as defendants the United States, Riddell, the Director of Internal Revenue, and Westberg. [R. 3-7, 12.]¹ On November 8, 1957 the United States filed a motion to intervene [R. 12-13], with a proposed complaint in intervention to enforce the lien [R. 14-17], and also a motion to dismiss the Hoyer complaint [R. 18-20]. On February 6, 1958 the District Court entered a formal order permitting intervention by the United States and granting the Government's motion to dismiss. [R. 20-21, 27.] An appeal was taken by the appellant Hoyer from this order, to this Court, but in the meantime the United States filed its amended complaint in intervention [R. 22-26], which the appellants as defendants in intervention answered. [R. 39-55.] The facts were stipulated and the issue of the validity of the levy was tried in the suit brought by the United States. Judgment was entered on April 22, 1959, that the appellants take nothing by their complaint and dismissing their complaint, and granting judgment in favor of the United States against the City of Los Angeles for the amount of the levy, while the court retained jurisdiction of the suit against Hoyer personally, should the judgment against the City of Los Angeles not be paid. [R. 87-88.] The notice of appeal from this judgment was filed on June 17, 1959 [R. 89-90], and a supersedeas bond was filed. [R. 92-94.] The jurisdiction of this Court rests upon 28 U. S. C., Section 1291.

¹The record references are to the record on this appeal and the record in the prior appeal No. 15964, which is consecutively paginated. [See Stipulation R. 103-104.]

Questions Presented.

1. Whether the accrued salary of a municipal employee in the possession of the city controller is subject to levy for unpaid federal taxes of the employee.

2. Whether the prior appeal of the controller from the dismissal of his suit for a declaratory judgment and to enjoin the collection of taxes is mooted by the final determination in the Government's suit that the levy is valid.

3. Whether, if the prior appeal is not moot, the controller's suit for declaratory judgment and injunction was properly dismissed.

Statutes and Rules Involved.

The statutes and rules are printed in the appendix to the brief for the appellees on the prior appeal.

Statement.

The facts of the case are not in dispute, and, as set forth in the stipulation [R. 56-60] and findings of fact [R. 81-87] of the District Court, may be summarized as follows:

On August 15, 1956, an assessment of income taxes for the year 1955 together with penalties and interest in the aggregate amount of \$150.63 was duly made against Richard A. Westberg, an employee of the City of Los Angeles, and hereinafter referred to as the taxpayer. Although notice of this assessment was duly given and demand for payment made upon the taxpayer no part of such assessment has been paid by him. [R. 82.] The interest on this liability accrues at the rate of 2 cents a day. [R. 82.] On March 19, 1957, a notice of levy in the amount of \$155.93 was duly served upon Dan O. Hoye, the controller of the City of Los Angeles (herein-

after referred to as the controller or Hoyer), upon property and rights to property in the possession of Hoyer belonging to the taxpayer. [R. 82-83.] On June 25, 1957, a final demand for payment of the amount of the levy was duly served upon Hoyer. On the date of the notice of levy and final demand the City of Los Angeles was indebted to the taxpayer, by reason of his employment, in the amount of \$158.78. [R. 83.] This sum was not paid over to the United States by Hoyer, but has been held by him on the contention that the levy was invalid since the United States was required to proceed in accordance with the procedure for the garnishment of salaries of municipal or state employees, as provided by Section 710 of the Code of Civil Procedure of the State of California. [R. 83-84.] The appellant acted in good faith in refusing to honor the levy on this account, and filed a suit for a declaratory judgment and injunction for the purpose of procuring a judicial declaration of the validity of the levy. [R. 84.]

The suit filed by Hoyer was in the form of a complaint against the United States, Robert A. Riddell, Director of Internal Revenue, and the taxpayer, entitled "COMPLAINT TO QUASH A 'NOTICE OF LEVY' AND 'FINAL DEMAND' SERVED ON A MUNICIPAL CORPORATION BY THE DIRECTOR OF INTERNAL REVENUE." [R. 3.] The United States filed a motion to intervene [R. 12-13], together with a complaint in intervention [R. 14-18] and a motion to dismiss the Hoyer complaint. [R. 18-20.] On February 6, 1958, the District Court permitted intervention by the United States [R. 20] and entered minutes granting the motion to dismiss. [R. 21.] On February 24, 1958, the United States filed its amended complaint in intervention alleging two causes of action: the first was against Hoyer personally for failure to pay over the amount of the levy [R. 22-

24]; the second cause of action was against Hoyer, the City of Los Angeles, and the taxpayer, to foreclose the tax lien and enforce the levy upon the accrued salary of the taxpayer, due to him from the City and in the possession of Hoyer. [R. 24-26.]

The order granting the motion to dismiss was entered on March 10, 1958. [R. 27-28.] On March 14, 1958, Hoyer, individually and as controller, filed a notice of appeal from this order. [R. 28-29.] The taxpayer never answered or otherwise appeared in the actions. Hoyer and the City on April 14, 1958, filed a lengthy answer to the complaint in intervention. [R. 39-55.] In this answer, Hoyer and the City put in issue the validity of the levy on the ground that it did not comply with Section 710 of the California Code of Civil Procedure [R. 40-45]; and Hoyer further alleged as a first defense to the Government's suit, that unless the state statute was followed, Hoyer would be personally liable to the taxpayer for the salaries [R. 48-49.] Hoyer also stated in the answer that he would deposit the levied funds with the Clerk of the Court. [R. 49.] In a second defense to the Government's suit, it was alleged that Hoyer had brought a suit to quash the levy which had been dismissed, that an appeal was pending from the dismissal of this suit and that an application had been denied by the District Court for an extension of time to answer the complaint in intervention, pending the appeal. [R. 49-53.] Neither Hoyer nor the City, however, took any appeal from the denial of their request for such an extension of time to answer the complaint in intervention, nor did they in any other way seek a stay of the proceedings in the District Court to determine the validity of the levy in the suit brought by the United States.

This suit was heard upon a stipulation of facts [R. 56-60], as set forth above, and on December 11, 1958, the District Court entered its decision holding that the validity of the levy was to be tested in the suit in intervention to enforce the levy brought by the United States, that the levy was valid since the federal tax levy could not be limited by state law, and that payment of the accrued salary to the United States would discharge the City and the controller of any liability to the employee-taxpayer. [R. 61-69.]² The court directed the United States Attorney to submit proposed findings of fact, conclusions of law and judgment as prayed for in the complaint in intervention. [R. 69.]

This decision was called to the attention of the Clerk of this Court, and on March 2, 1959, this Court, having previously denied a motion to dismiss the prior appeal (No. 15964), entered an order in the prior appeal reading as follows:

IT IS HEREBY ORDERED that the order of submission heretofore filed by this court in the above numbered case of December 3rd, 1958, is vacated and the determination of this appeal held in abeyance pending the complete trial of the Government's case in intervention, Civil No. 1065-57-T, in the court below and until such time as either an appeal is taken from

²On December 12, 1958, the court issued a Note to its Memorandum Decision of December 11, clarifying the first opinion with respect to the fact that the United States did not bring a suit for a declaratory judgment but rather brought a suit at law to foreclose its lien and collect on the levy. [R. 69-71.]

the judgment in intervention, or the time for taking such an appeal expires and this court is formally advised of either fact.³

On April 22, 1959, the District Court entered a supplemental opinion, (entitled Addendum to the Memorandum of Decision) [R. 71-79] together with its findings of fact, conclusions of law and judgment. [R. 80-88.] In this supplemental opinion, the court rejected the claim of the United States to recover judgment for the amount of the levy against Hoyer personally as a penalty for the refusal to honor the levy, and also to recover the amount of the levy from the City of Los Angeles in foreclosure of its lien upon the accrued salary of the taxpayer. The court held that the United States could not have both amounts, since the purpose of the so-called "penalty" against a person in possession of property of a delinquent taxpayer was to insure the collection of the levy. In this case, the controller had not defeated the levy by paying it out, but held the levied funds pending a judicial determination of the validity of the levy, so that there was no basis for a penalty against Hoyer personally, unless the City of Los Angeles failed to pay the judgment against it.

In its conclusion of law [R. 85-87] the court ruled that it did not have jurisdiction over the subject matter of the Hoyer complaint or over the United States as a party thereto. It also ruled that the deposit of the levied funds

³The appellants' brief incorrectly states that the trial on the merits of the case took place in the District Court after the entry of this order. (Supp. Br. 2.)

with the Clerk of the District Court was not a compliance with the levy or a valid interpleader. [R. 85.]⁴ The judgment below [R. 87-88] provides that the appellants take nothing and that the Hoyer complaint be dismissed; that the United States take nothing on its first cause of action against Hoyer personally, and that the United States have judgment in foreclosure of its lien against the City for the amount of the levy and costs. Jurisdiction, however, was retained over the action against Hoyer personally to enter judgment, if the City did not pay the judgment against it.

Summary of Argument.

The substantive issue involved in this appeal, whether accrued salaries of public employees are subject to federal tax levy, has been conclusively settled by *Sims v. United States*, 359 U. S. 108. The procedural question, whether the validity of the levy in this case was to be determined in a suit brought by the official in possession of the levied salary for a declaratory judgment and to enjoin the levy, or in a suit by the United States to enforce the levy, has been rendered moot by the decision on the merits. In any case, if this question is not moot, the court below correctly dismissed the suit for a declaratory judgment and to enjoin the levy.

⁴The appellants do not raise any question here as to this ruling, and the interpleader statute, 28 U. S. C., Section 1335, does not authorize such suits against the United States. *Herter v. Helmsley-Spear, Inc.*, 149 F.Supp. 713 (S.D. N.Y.).

ARGUMENT.

I.

The Accrued Salary of a Municipal Employee in the Possession of a City Controller Is Subject to Federal Tax Lien and Levy for Unpaid Federal Taxes Due From the Employee.

It is clear from the undisputed facts in this case that the underlying substantive issue involved is whether or not the accrued salary of a municipal or state employee, who is delinquent in federal tax, is subject to federal tax lien and levy. This, in final analysis, is the only issue that was raised by the Hoyer complaint and it is the only issue that was raised by the Government complaint in intervention. The court below has held that such salaries are subject to the federal tax levy, and the appellants do not offer any argument or citation of authority to show that this decision is wrong. The short of the matter is that no argument or citation of authority is available to the appellants, since the decision of the court below is in accord with *Sims v. United States*, 359 U. S. 108. The claim of the appellants (Supp. Br. 4-5), that the local and state officials of the State of California are now confronted with a dilemma presented by the asserted conflict between the federal tax levy provisions and Section 710 of the California Code of Civil Procedure, has no substantive foundation whatever. It is now settled that such state law provisions must yield to the federal statutes with respect to the collection of taxes. *Sims v. United States*, *supra*.

The alleged conflict between the decision of the court below and the decision of the District Court in *Hoye v. United States*, 109 F. Supp. 685 (Supp. Br. 3-4) has to do solely with a procedural problem as to how the validity of a federal tax levy could be tested, before its validity had been decided, whether in a suit for a declaratory judgment and injunction to enjoin the collection of taxes brought by the public paymaster, or in a suit by the United States to enforce the lien and levy pursuant to federal statute. Internal Revenue Code of 1954, Section 7403. But that issue, as we shall now show, has been rendered moot by the decision on the merits, and if it is not moot, then, we submit, it was correctly decided by the court below.

II.

The Question Whether the Validity of the Federal Tax Levy Can Be Tested in a Suit Brought by the Controller for a Declaratory Judgment and Injunction or in a Suit Brought by the United States to Enforce the Lien and Levy Is Now Moot.

We wish first to suggest that, in any event, the prior appeal (No. 15964), and the procedural issue therein presented, is now moot, since the question whether the Hoye suit was properly dismissed is before this Court in the appeal from the final judgment of the District Court. *Moore Drydock Co. v. Pillsbury*, 98 F. 2d 115 (C. A. 9th).

Furthermore, as presented in the appeal from the final judgment, the procedural issue is moot on the ground that the court has rendered a decision on the merits, which would deny Hoye the relief sought even if the court below had jurisdiction of his complaint. A reversal of

the court below, on the ground that it should have considered the Hoyer complaint, would be pointless, since the only result would be a decision on the merits dismissing the complaint. *Alaska Packers Assn. v. Marshall*, 95 F. 2d 279 (C. A. 9th); *Federal Reserve Bank v. Idaho Grimm Alfalfa Seed G. Assn.*, 8 F. 2d 922, 924-925 (C. A. 9th), *certiorari denied*, 270 U. S. 646; *California Fruit Cannery Assn. v. Lilly*, 184 Fed. 570, 574 (C. A. 9th).

III.

If the Question Under Point II Is Not Moot, Then the Court Below Was Correct in Dismissing the Complaint for a Declaratory Judgment and to Enjoin the Collection of Taxes.

We believe that the Hoyer complaint on its face shows that it falls squarely within the statutory prohibitions against suits for a declaratory judgment or an injunction to enjoin the collection of federal taxes. 28 U. S. C., Sections 2201 and 2463. Neither the City nor the controller admittedly has any interest in the levied funds. [R. 49.] If the controller has any question as to the validity of a levy, he may simply await a judicial determination of that question in a suit brought by the United States to foreclose the lien. As long as he does nothing to impair the lien or dissipate the levied funds, he does not incur any risk or penalty.⁵ There is no reason why a third person having no interest in the levied fund except as a stakeholder should be allowed to delay or hinder the col-

⁵The Government is not appealing from the judgment below which holds that Hoyer is not personally liable, the court below merely retaining jurisdiction to enter judgment against him in the event the City fails to pay the judgment against it.

lection of taxes in any way by being permitted to bring a suit to enjoin the collection of such taxes.

We have set forth our argument on this point in full under Point II of our brief in the prior appeal and as stated in that brief (p. 19):

Indeed, the prohibition against suits restraining the collection of taxes would be an empty form, if all persons holding property concededly belonging to the taxpayer—and in which the holder himself claims no interest—might prevent distraint and collection by bringing action for injunction or declaratory judgment.

Conclusion.

The judgment of the District Court is correct and should be affirmed.

Respectfully submitted,

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December—1959

No. 16554 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN FRANCIS DEVINE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On March 4, 1959 an indictment was filed against appellant in which the Grand Jury for the Southern District of California charged him in three counts with violations of Section 1702 of Title 18, U. S. C. Count One charged him, in effect, with taking, on February 21, 1959, a letter addressed to the "Hays Company, 311 East Fourth Street, Los Angeles 13, California," which theretofore had been in a post office, with design to obstruct the correspondence of and before being delivered to said addressee. Count Two charged a similar offense on February 21, 1959, but with respect to a letter addressed to "Irving Blitz & Associates, 421 South Wall Street, Los Angeles 13, California." Count Three also charged a similar offense on February 21, 1959, but with regard to a letter addressed to "Philip Jaffe, 338 East Fourth Street, Los Angeles 13, California" [Clk. Tr. 2, 3].

The District Court had jurisdiction of the cause under Section 3231 of Title 28, U. S. C., which confers on all District Courts original jurisdiction "of all offenses against the laws of the United States."

The case proceeded to trial on April 14, 1959 before the Honorable Harry C. Westover, District Judge, and on April 15, 1959 the jury rendered a verdict against appellant of guilty on all three counts of the indictment. On May 8, 1959 appellant, having been under the supervision of the local probation officer after serving time on a prior conviction of a similar offense [Rep. Tr. 274], was sentenced to the custody of the Attorney General for a period of five years for the offense charged in Count One of the indictment and for a like term on each of the other two counts, the sentences on Counts Two and Three to run concurrently with the sentence imposed on Count One. A Judgment and Commitment was filed on the same day. A Notice of Appeal was filed on May 19, 1959. The Notice of Appeal recites that the Judgment and Commitment was entered on May 11, 1959.

Jurisdiction of this Court stems from Section 1291 of Title 28, U. S. C.

II.

STATUTE UNDER WHICH THE APPELLANT WAS PROSECUTED.

Section 1702 of Title 18, U. S. C., provides in pertinent part as follows:

"Whoever takes any letter, postal card, or package
* * * which has been in any post office * * *
before it has been delivered to the person to whom
it was directed, with design to obstruct the corre-
spondence * * * shall be fined not more than \$2,-
000 or imprisoned not more than five years, or both."

III.

STATEMENT OF THE CASE.

As indicated above, this case proceeded to trial on April 14, 1959, before Judge Harry Westover, and a jury was impanelled [Rep. Tr. 7]. Before an opening statement was made by Government counsel, the Judge admonished the jury that the case was to be decided solely from the evidence which would be admitted. The Court further stated that the attorneys had a right to make an opening statement at the beginning of the case but that it consisted primarily of a statement of the attorneys as to what "they expect to prove." It was said that no statements of the attorneys would be evidence in the case and were only opinions as to what the evidence would be [Rep. Tr. 8].

Government counsel then made an opening statement which gave the general scope of the evidence to be offered against appellant. Since it was only a statement as to an expectation of the facts which would be proved, it was not stated whether the ultimate facts were to be proved by direct evidence or through proper inference based on circumstances to be brought out during the trial, or both [Rep. Tr. 9-12].

On April 14, 1959, at the end of the day's Court proceedings, after the jury had left the courtroom, Judge Westover discussed instructions with counsel. The Court stated that the United States Attorney had offered certain special instructions which he thought were "pretty near the crux of the case." Judge Westover stated that he was satisfied that "delivery" was "manual" delivery to the addressee. He then invited counsel to bring in any other authorities which were pertinent to that subject [Rep. Tr. 108-109].

The next day, April 15, 1959, the Government rested its case [Rep. Tr. 176].

Shortly thereafter, appellant made a Motion for Judgment of Acquittal, "based mostly on what is 'deliver' ". Appellant's argument more or less followed the line that there was no showing he was not entitled to receive the various letters "perhaps as an authorized agent by any of the members of that company or, as I said, as a partner or member of the association itself." Counsel for appellant further stated at that time "* * * it may be a technical point * * *". After argument was heard, the Court denied the Motion for Judgment of Acquittal [Rep. Tr. 177-182].

Appellant, John Francis Devine, then took the witness stand and was the only witness offered on his behalf. Thereafter the Government called two other witnesses in rebuttal and rested [Rep. Tr. 231].

Counsel for appellant then renewed the Motion for Judgment of Acquittal on the same basis on which he had presented his original motion. It was denied by the Court [Rep. Tr. 232].

Counsel for both the Government and appellant then made their arguments to the jury [Rep. Tr. 233-253], and the Court gave its instructions [Rep. Tr. 253-269]. The Court inquired as to whether the Government had any objection to the instructions and, being informed that the Government had not, directed the same inquiry to appellant. Counsel for appellant stated that he had no objection and offered no further instructions [Rep. Tr. 269].

IV.

SUMMARY OF THE FACTS.

Since appellant had stated that one of the questions raised on appeal is whether “under the indictment and in the light of the presumption of innocence, there was delivery of the letters, etcetera, to the person(s) to whom they were directed,” the Government feels that a résumé of certain portions of the testimony would be helpful to the Court.

The first witness called by the Government was Ralph A. Walter, a mail carrier so employed for 13 years. He was on duty Saturday, February 21, 1959 and his route in distributing mail was near Fourth and Wall Streets. The mail carrier looked at certain photographs, particularly one for the door of 421 South Wall Street, where Mr. Blitz was the addressee, and another for the doorway of the Western Frame Company located upstairs at 421½. (The address at 421 South Wall Street is involved in the charge set forth in Count Two of the indictment and the Western Frame Company at 421½ South Wall was involved in a “similar offense” on which the Government in its opening statement told the jury evidence would be offered, but only on the question of showing the intent and knowledge of the defendant in connection with the other three offenses.) The carrier testified that on Saturdays during February 1959, he made just one delivery about 8:30 in the morning and would have mail for every stop, including both Western Frame and “Blitz” [Rep. Tr. 14, 15, 18]. Mr. Walters testified that when he dropped mail in Mr. Blitz’s place of business he put it through a “regulation mail slot” (which was called to his attention on the photograph) and the mail then fell on the floor. With respect to Western

Frame Company, which was not open on Saturdays, the carrier would push the mail underneath the door. In other words the carrier would push the mail through "this little crack" which was called to his attention in Exhibit No. 2, one of the photographs [Rep. Tr. 16].

This witness then testified that with respect to Monday through Friday during the week, he would go inside the door and put the mail for Western Frame in a "regulation" mailbox, which had a slot in the front where the mail went in [Rep. Tr. 17].

The Government called another letter carrier who had been so employed for twelve years and who also had a route near Fourth and Wall in Los Angeles [Rep. Tr. 19, 20]. On Saturday, February 21, 1959 this witness, Frank Harding, was working on his route and saw appellant [Rep. Tr. 20, 21], who was standing in the doorway at 356 South Los Angeles Street, the business being closed on that day and the door locked. The carrier had previously seen a photograph in the possession of inspectors, and therefore recognized appellant. As the carrier approached 330 South Los Angeles Street, he looked to his right and saw the appellant trying the door knob at the 360 address. He further stated that the company at that address was called "David of Hollywood" and that there was another one called "The Field Company". Further, this witness had never met appellant personally before this, although he had been on that route approximately a year and a half. [Rep. Tr. 22, 31, 33].

The witness made a couple of other stops and then proceeded to another address where he asked to use the phone for the purpose of notifying the inspectors that "the gentleman they were looking for was on the route." [Rep. Tr. 22, 23].

This witness was asked to look at Government's Exhibits 4 and 5 and he recognized them as photographs of the Jaffe Company door both from the inside and outside. He stated that he delivered mail to the Jaffe Company on his route and made only one stop on Saturday. On that day he normally arrived there between 9:00 and 9:15 in the morning. He remembered that he had actually delivered mail there on Saturday, February 21st. The Jaffe Company was locked up on that day, and the mail carrier knew it because he always tried the door to see if there was someone there. There was no one there on that Saturday. When passing by the front of the company's door one could see down on the floor and see if there was any mail there because of a window in the door. The mail would fall through a slot in the door on to the floor [Rep. Tr. 24, 25, 26]. The store, operated by Philip Jaffe, 338 East Fourth Street, Los Angeles 13, California, is the location mentioned in Count Three of the indictment.

This carrier also testified that the Hays Company, 311 East Fourth Street, mentioned in Count One of the indictment, was on his route. The mail slot in the door of the Hays Company, as shown in Exhibit No. 6, was up by the door latch over to the side about three feet above the ground. That is where the carrier put the mail unless there was someone there. On that occasion he would open the door and then go in. The center of the door frame was made of glass so that one could look through the door and see the spot where the mail would land on the floor. The witness remembered that he had actually delivered mail to the Hays Company on Saturday, February 21, 1959. On that occasion the door was locked and the sign said "Closed". There was no one actually at the

Hays Company on that day. He testified that he normally shook the door to see if he could get in and hand the mail to a person inside.

The Hays Company was not very far away from the Jaffe Company, that is, down the street on the opposite side. For the location of the Hays Company the witness put a number 2 on the map, Exhibit No. 3, and for the location of the Jaffe Company he put a number 3 on that exhibit [Rep. Tr. 25-28].

As Mr. Harding went about delivering his mail on his route, he thereafter saw Mr. Frank Carey, a post office investigative aide, in the vicinity. Mr. Carey was in an automobile, accompanied by someone else.

Irving Blitz was then called by the Government. He was an importer located at 421 South Wall Street. The name of the company was Irving Blitz & Associates. He looked at Exhibits 1 and 2 and testified that the double door on number 1 was to his business establishment [Rep. Tr. 35]. Western Frame was located next door. This witness remembered that on February 21, 1959, he was out-of-town and the latch on his door was locked. He testified that his mail was put through a door slit on the left-hand door of the double doors. The floor on the inside of the store was practically even with the floor on the sidewalk outside and there was about an inch between the floor and the bottom of the door [Rep. Tr. 36, 37]. The witness then looked at Exhibit No. 7 which was a check payable to "Irving Blitz & Associates" in the amount of \$284.20 and testified that he had never received this particular check in his hands. He stated that the check related to an invoice which billed Service Exchange for that amount for 24 transistor radios which had been shipped to the latter company three weeks prior

to the check coming into his place [Rep. Tr. 39]. He stated that he got another check from Service Exchange after the post office authority had notified him it was missing. The check was cancelled and another one issued in its place [Rep. Tr. 39].

Mr. Philip Jaffe took the stand and testified he was a wholesale jobber at 338 East Fourth Street, that Exhibits 4 and 5 were pictures of double doors on his establishment from the inside and the outside. On Saturday, February 21, 1959, he was not at his place of business and his doors were padlocked. There was a space of about a quarter of an inch underneath between the bottom of the door and the floor. The door had a glass center so that one could look through it and see whether or not there was mail on the floor. When the mail went through the slot in the door it fell only about 12 to 15 inches away from the door itself [Rep. Tr. 45-48, 52, 53].

With respect to Exhibits 10 and 11, which were advertising brochures from the Astra Trading Corporation in New York City, Mr. Jaffe testified that he had in the past received circulars from that corporation but that those two exhibits had never been in his possession. He did not get any mail on the Monday following the 21st. On Exhibit No. 12, an envelope from the Portland Check Room, he never received that letter into his hands [Rep. Tr. 48, 49]. Inside there was a check for \$85.00 which was dated February 19, 1959. Mr. Jaffe gave some testimony with respect to the business transaction with the Check Room which accounted for the payment [Rep. Tr. 50, 51].

On cross-examination Mr. Jaffe testified that he had received another check in lieu of the one that was contained in the envelope, since the postal authorities had

advised him that they had some of his mail in their possession and they told him one of the letters was from the Portland Check Room [Rep. Tr. 52].

Bert Goldner, a manufacturer of picture frames at 421½ South Wall Street, was called as a Government witness. His attention was directed to Exhibit No. 2 where the words "Acme Frame Company" appeared. That was the former name of his business which was being changed to Western Frame.

On Saturday, February 21, Mr. Goldner came into his place of business about noon. The door had been locked prior to the time he came in. There was a space underneath the door in Exhibit No. 2, which was about one-half inch high.

Mr. Goldner testified that Mr. Devine was not employed by his company, that he had never seen appellant before the time of trial, nor had he had any business dealings with him. The witness then went on to testify with respect to Exhibit No. 9, a check from the United States Rubber Company, dated 2-16-59 from New York, for the sum of \$49.66. The name of the payee appeared to be obliterated but the address seemed to be 421 Wall Street, Los Angeles, California. On the reverse side the apparent handwritten endorsement "John F. Devine" is to be seen. He testified that the endorsement on the reverse side was not his and he had never given anyone the authority to place that endorsement on that exhibit [Rep. Tr. 62, 63, 65, 66]. Mr. Goldner's testimony showed that he had had a business transaction with the U. S. Rubber Company in New York in which a payment was due to Western Frame of \$49.66. The New York company issued a duplicate check to Mr. Goldner when he advised them the postal authorities had possession of the original check [Rep. Tr. 59-61].

Gene Yamamoto was an accountant for the Hays Company at 311 East Fourth Street [Rep. Tr. 57], and was employed by them on Saturday, February 21, 1959 [Rep. Tr. 81]. The company was normally open on Saturday and on the above date the witness thought that someone came in close to noon. When no one was at the shop on Saturdays the front door was locked [Rep. Tr. 81].

Government's Exhibits 13 through 19 represented books and records for the Hays Company relating to February 21, 1959. The witness was also shown Exhibit No. 6, a picture of the front door of the Hays Company [Rep. Tr. 68]. He testified that there was about a quarter inch opening between the front door and the closest part of the floor underneath that door. There is a mail slot shown in the picture through which the mail was inserted. If one stood outside the door and looked through the glass in the door, the place where the mail falls after it is put through the slot could be seen [Rep. Tr. 69]. Mr. Yamamoto then went on to testify with respect to a transaction had by the Hays Company with Balfour-Guthrie & Company [Rep. Tr. 69-74]. It related primarily to Exhibit No. 13, which was called a Notice of Arrival [Rep. Tr. 70].

The witness's attention was called to Exhibits 18 and 19, the former being an envelope with the Pringle Drug Company return address on it and the latter being a check from the same drug company payable to the Hays Company for \$11.17, dated February 19, 1959. Mr. Yamamoto then went on to testify with respect to a transaction by the Hays Company and Pringle Drug which involved approximately that sum of money. He stated that his company had not received Exhibit No. 19, the check, through the mail [Rep. Tr. 74-76, 78].

Certain other witnesses were thereafter called, primarily to show the mailing of Exhibit 19 to the Hays Company by the Pringle Drug Company, the mailing of Exhibit 13, the Notice of Arrival, to the Hays Company by Balfour-Guthrie & Company in San Francisco, the mailing of Exhibit 12 containing the check dated February 19, 1959, for \$85.00 from the Portland Check Room in Stockton, California, to Philip Jaffe at Los Angeles, and the mailing of Exhibit 17, a check dated February 19, 1959, for \$284.20 from Service Exchange Distributors in San Francisco to Mr. Blitz in Los Angeles [Rep. Tr. 82-105].

It is to be noted that in each instance the above pieces of mail were mailed out in connection with business transactions of the Hays Company, Irving Blitz & Associates, and Philip Jaffe. Mostly, goods had been ordered and shipped and the senders of the checks had mailed them in as payment.

The same was true with respect to the transaction involving Western Frame, where a witness was called from United States Rubber Company in New York to testify with respect to Exhibit No. 9, a check payable to Western Frame Company in Los Angeles [Rep. Tr. 112-117]. That witness had no accounts payable to John F. Devine or John Francis Devine at or near the time in question.

Frank R. Carey, an investigative aide with the Postal Inspection Service testified he was not on duty on Saturday, February 21, 1959 but did meet Mr. Padgett, a post office inspector, on that day after receiving a telephone call from a post office employee [Rep. Tr. 122, 123]. The two men went to the vicinity of Winston and Los Angeles Streets shortly thereafter, as shown on the map, Exhibit No. 3. A few minutes later they saw Mr. Hard-

ing, the post officer carrier who had previously testified in the case. The carrier was delivering mail on Fourth Street at the time the two men saw him. Mr. Carey and Mr. Padgett drove east on Fourth Street and shortly thereafter also saw appellant, John Francis Devine. At that time he was between Winston and Los Angeles Streets. Mr. Carey indicated with a dotted pencil line the places and directions which appellant was traveling [Rep. Tr. 124, 125]. By looking at the exhibit and reading the testimony given by this witness, it is apparent that appellant did a considerable amount of walking around in the vicinity of Los Angeles and Fourth Streets [Rep. Tr. 121-130]. On at least one occasion, appellant retraced his own path [Rep. Tr. 129].

Finally, after trying to keep track of appellant for a while, Mr. Carey parked his car near Fourth and Wall and he and Mr. Padgett got out. The neighborhood there was predominantly business, mercantile wholesalers, some printing establishments and jobbers.

As the two men got out of the car, appellant had just turned the corner at Winston and Wall and started coming toward them [Rep. Tr. 130]. Shortly thereafter, Mr. Carey and Mr. Padgett noticed appellant stop about a quarter of a block North of Winston on the West side of Wall Street, near the address of 421 Wall Street [Rep. Tr. 131]. Apparently appellant paused for several minutes at the spot where the two post office men had first seen him. They kept him under observation and noticed that appellant was standing very close to the store front [Rep. Tr. 133-135].

Appellant finally walked up to the corner of Fourth and Wall and stood on the stoop of a store there. A picture of the stoop was contained in Exhibit No. 23.

At that point appellant took what appeared to be a letter out of his pocket, opened it and threw it down on the sidewalk [Rep. Tr. 135, 136]. Mr. Carey actually walked by appellant at this time and saw that the envelope resembled Exhibit 8, the Service Exchange letter with the blue and yellow return address [Rep. Tr. 171, 138, 139].

The two post office men walked around a little and then approached closer to appellant. He had walked across the street from the store stoop and was on the Northwest corner of Fourth and Wall; he appeared to have some envelopes in his hand. There they saw him open something that had a rather orangish enclosure [Rep. Tr. 137]. The orange enclosure resembled one of the papers attached to Exhibit No. 16 [Rep. Tr. 138], and he threw it in the gutter [Rep. Tr. 139-140].

The witness was shown pictures of the Jaffe Company, Exhibits 4 and 5, and stated that he had passed by the Philip Jaffe establishment on that day. Mr. Carey looked in through the glass windows at that address and noticed that there was mail on the floor just behind the door. At that time he was walking along East on Fourth and appellant was behind him. Mr. Carey and Mr. Padgett continued to the corner of Fourth and San Pedro, crossed to the Northeast corner, and stepped inside an open door a few doors down. The street jogs at that point slightly and they watched the appellant from their post inside the doorway. They had crossed the street in getting to that doorway and were able to observe the appellant as he was proceeding in their direction across the street [Rep. Tr. 140, 141].

As the witness and his companion continued to observe appellant, the latter stopped in front of the Jaffe Company and backed up against the doorway. "He kept doing

something with his feet. We couldn't tell just exactly what, but he kept shuffling his feet around." During this maneuvering, appellant stooped over. There were some pedestrians passing by, and when some one would walk past him, he would stop any motions and just stand there. Appellant watched the passers-by proceed down the street and then would start manipulating his feet and bending over. He actually bent over several times and fumbled around at the bottom of the door. This went on about five minutes. *Mr. Carey then saw appellant pull a white envelope out from under the door.* Exhibit 4 was a photograph and was taken from the exact point where the witness and Mr. Padgett had the man under observation [Rep. Tr. 142, 143]. During all this time Mr. Carey had no difficulty in watching appellant or seeing what he had in his hand and there was no obstruction of the witness' view of appellant. Mr. Carey stated that on the last time the appellant stooped over "he fumbled around a little bit and the letter came out. He was facing our direction and he took the letter out with his left hand" [Rep. Tr. 143, 144, 162-164].

Appellant got the above-mentioned letter from the area at the bottom of the door, that is, between the bottom of the door and the sidewalk. After he came up with the envelope, he put it in his pocket and walked east on Fourth Street to the corner of San Pedro, South on San Pedro to Fifth Street. Shortly thereafter, Mr. Carey and Mr. Padgett apprehended appellant at the corner of Fifth and San Pedro Streets [Rep. Tr. 144, 145].

When the defendant was apprehended he had Exhibit No. 12, the letter addressed to Philip Jaffe, 338 East Fourth Street, in his hand, unopened. Appellant handed Mr. Carey the letter and admitted that he knew who

the witness and his companion were. Appellant said, "I want to go back to jail." When asked if he had any other mail, appellant said, "Yes," that he would give it to Mr. Carey in a minute. As the three men started to walk back to where the car was parked, appellant pulled two additional letters out [Exs. 10 and 11] and handed them to Mr. Carey [Rep. Tr. 147, 148].

On their way back to the car the men stopped in front of Jaffe's. The two post office men asked appellant if that was where he got the mail. Appellant said "Yes." Shortly thereafter, Mr. Clifford drove up and stopped and got out of his car and came to where the other three men were standing. They all started walking toward Mr. Clifford's car, the witness walking a short distance behind appellant. As they continued on, the witness saw appellant drop what appeared to be a crumpled piece of paper out of his pocket. It was Exhibit 9, the United States Rubber Company check, *crumpled up in a ball*. Thereafter Mr. Carey left Mr. Clifford and Mr. Padgett with Mr. Devine to return to pick up the material which they had seen appellant throw away previously at the corner of Fourth and Wall. At the Southwest corner of Fourth and Wall, Mr. Carey found Exhibit 8, the envelope from the Service Exchange Distributors. On the Northwest corner of Fourth and Wall in the street, Mr. Carey picked up at least two envelopes, Exhibit No. 18, a window envelope from the Pringle Drug Company, Exhibit 14, which was the Balfour-Guthrie, Ltd., envelope, and Exhibit No. 13, "Notice of Arrival." The exhibits had gotten wet on the street. The above exhibits were found within a couple of feet from where the appellant had been standing previously on those two corners.

Jack B. Clifford, an investigative aide for the post office testified that he saw Mr. Carey, Mr. Padgett and appel-

lant in the area of Fourth and Wall in the morning hours of Saturday, February 21, 1959 [Rep. Tr. 172]. This witness testified further that he went down to the Federal Building with the three men and found on the person of appellant Exhibits No. 7 and No. 19. No. 7 was a check payable to Irving Blitz and Associates in the amount of \$284.20 from Service Exchange Distributors and Exhibit No. 19 was the check payable to the Hays Company in the amount of \$11.17 from the Pringle Drug Company. They were both in the defendant's wallet [Rep. Tr. 173, 174].

It was after Mr. Clifford testified that the Government rested [Rep. Tr. 176].

Appellant took the witness stand in his own behalf and testified that his business was that of being a *cook* [Rep. Tr. 185]. After he had breakfast on the morning of February 21, 1959, he went out looking for work at any restaurant which had work to offer him [Rep. Tr. 186]. Appellant admitted walking down to Wall Street and standing in a doorway on Los Angeles Street [Rep. Tr. 187]. He also stated that he spoke to Mr. Harding, the mailman who had previously testified for the Government. He asked for work at some places but they did not have any to give him and told him to come back [Rep. Tr. 188].

Appellant denied seeing Government's Exhibits 7 to 21 before the time he took the stand to testify [Rep. Tr. 192, 193]. Appellant went on to testify as to his movements on the date and times in question, contending that he went to the blood bank, which was closed, and described his various movements standing around and walking in the neighborhood involved.

Appellant stated that after he was arrested by Mr. Carey he did not throw anything away and that Mr. Carey did not search him. Appellant contended that when Mr. Carey walked up "he (Mr. Carey) had stuff in his hand" but appellant did not know what it was. He further denied that he was taken back to Jaffe's after he was arrested and that he had been asked whether he took any mail from Jaffe's [Rep. Tr. 196-198].

Appellant then went on to give his version of what happened at the Federal Building, and stated that Mr. Carey came in with a lot of wet stuff in his hand [Rep. Tr. 198, 199]. Appellant denied that he had any checks at all in his wallet at the Federal Building [Rep. Tr. 201]. Devine stated that when he got up that morning he had no letters in his possession belonging to any one else [Rep. Tr. 202].

Under cross-examination appellant testified that on November 13, 1953, during November 1954 and in February 1956 he was convicted of three separate felonies [Rep. Tr. 205, 206]. He further testified that during the month of February 1959, *he was not employed at all* [Rep. Tr. 206, 207]. He again denied that he had any letter at all in his hand at the time the post office inspector came up to him near Fifth and San Pedro [Rep. Tr. 207, 208]. He said he had no "U. S. mail" in his possession at any time. He further denied that he ever had the U. S. Rubber Company check, Exhibit No. 9, in his possession. (That was the exhibit Carey testified he saw the appellant throw to the ground in a crumpled ball) [Rep. Tr. 209].

Appellant further claimed that with respect to Exhibits No. 7 and No. 19, the two above-mentioned checks, that Mr. Clifford never took them out of his wallet and the

checks were not in his wallet [Rep. Tr. 213]. When his attention was called to Exhibit No. 9, the United States Rubber Company check, appellant testified that the endorsement on the reverse side of the check "looks something like my signature." [Rep. Tr. 214].

After appellant testified, the defense rested and the Government called three witnesses for rebuttal purposes. Thereafter both the Government and appellant rested [Rep. Tr. 231].

In making opening arguments, Government counsel endeavored to explain the Government's position with respect to the manner in which the mail was extracted by appellant from underneath the doorway of the business houses, particularly Jaffe's door, as testified to by Mr. Carey and Mr. Padgett. Government counsel stated that obviously we did not claim that any one had actually tried to put his hand underneath the door [Rep. Tr. 235]. The jury's attention was directed to the photograph showing the various spaces underneath the doorway involved. Government counsel then argued that the "only reasonable inference you can draw is that the appellant had some way to get this mail out from underneath the doorway." In other words, the jury was asked to draw a reasonable inference from the evidence that the appellant had some method other than putting his hands or feet underneath the door to extract the mail from the other side. It was then that Government counsel stated "this isn't in evidence and I don't say the defendant had this, but . . ." At that point counsel for appellant objected to the fact "that an implement here" was going to be used that was not identified with the case. Government counsel then stated that she did not claim it was in the case and that she wanted to use it as an "illustration".

The Court then advised Government counsel that no reference should be made to anything except the evidence in the case and she was instructed not to refer to anything but such evidence [Rep. Tr. 236].

Counsel for the Government then indicated, in effect, that she would not waste her time for argument in any further discussion about the point and went ahead with the argument, abandoning the object she had started to use as an illustration. The remarks to the jury which immediately follows the above colloquy were then obviously only verbal appeals to the jury to draw reasonable inferences from the evidence in the case and no more.

“Ladies and gentlemen, you can only get underneath a doorway where there is this space with some kind of instrument. There was this maneuvering of the appellant at the Jaffe store. Obviously, I think anybody could figure out that there was a little bit of maneuvering to get underneath the door of some kind, with a heavy strap or something that is firm enough to go in and rest on a letter. You can see these letters are fairly light. They are not heavy. They are fairly light. If you have got *something* on one of these letters from underneath the door where it is sitting on the door you could just manage to lay it on there and drag it out this way:

“Obviously the defendant did just that because two men watched him come up from underneath the door with the letter.” (Emphasis ours) [Rep. Tr. 236, 237].

Later in the Government’s argument it was stated:

“His whole story is another fabrication. He may have been out of work. Ladies and gentlemen, that

shows he was not certainly associated with any of these companies. He didn't own a half interest in all these companies so that he had those checks legitimately. That is against all of the weight of the evidence."

Counsel for appellant commenced his argument and endeavor to meet the Government's argument that Devine had been using some implement to drag the mail from underneath the doorways. He stated:

"If you look at the Jaffe doorway, he was standing almost flush with the street there shuffling his feet a little. How is he manipulating some wire contraption that the prosecution would have you think he used if those inspectors couldn't see the wire contraption? Where was it? They found everything else, but they didn't find that.

"Ever since he was at the Jaffe store they watched him. What happened if there was a wire there? How could he have it on his feet and use it and the inspectors not see him using it? But these inspectors were watching him. I think we have no evidence that there was any such thing going on." (Emphasis added) [Rep. Tr. 245, 246].

Later counsel for appellant argued:

"I think that the prosecution has shown you the Jaffe doorway. It is manifestly impossible to get either your feet or your hands through the crack or through a slit of any kind on these doors, and this is what they hang their case on, the taking of mail by shuffling in front of a locked door." [Rep. Tr. 248].

After argument was concluded the Court instructed the jury, and, among other things, stated that:

“There are two types of evidence from which a jury may properly find a defendant guilty of an offense. One is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of an offense.

“As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury be satisfied of the defendant’s guilt beyond a reasonable doubt from all the evidence in the case.

*“Statements and argument of counsel are not evidence in the case, unless made as an admission or a stipulation of fact * * **

“The evidence in the case consists of sworn testimony of the witnesses, *all exhibits which have been received in evidence*, all facts which have been admitted or stipulated, all facts and events which have been judicially noted, and all applicable presumptions stated in these instructions * * *

“You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from the facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

“An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.” (Emphasis added) [Rep. Tr. 256, 257].

Later in the instructions the Court advised the jury that the statute under which the indictment had been returned was intended to protect letters, not only while they are in the physical possession of the post office but also until they are delivered to the person to whom they are addressed. The Court then went on to list the various elements of the offenses charged in each count and included therein was the following:

“(3) That he took the letter before it was delivered to the addressee, * * *”

The jury was also instructed that

“* * * this word ‘delivered’ means a manual delivery of a letter to whom it is addressed. In other words, it must actually reach the hands of the addressee.

“* * * The defendant is not charged with stealing a check or document from any one. He is charged only with violation of Section 1702 of Title 18, U. S. C., which makes it an offense to take any letter, which has been in any post office, before it has been delivered to the person to whom it was directed.

“Should you find that the defendant did not take such a letter or letters before delivery, you must find the defendant not guilty, even though you may find that he was in possession of, or had stolen letters, checks, or other documents which were the property of another.” [Rep. Tr. 266-268].

When the instructions were completed counsel for the defendant stated that he had no objections to the instructions read to the jury. He offered no suggestions as to any additions to the instructions [Rep. Tr. 269].

V.

ARGUMENT.

In connection with appellant's argument on his first point on appeal, it is to be noted that at page 8 of his brief, he admits that Section 1702 of Title 18 contemplates "manual" delivery of mail to the addressee, and also that appellant had or took into his possession mail addressed to the parties named in the indictment, which mail had previously been in the custody of the "United States Mail." In the light of such admissions, appellant then propounds the theory that the Government's proof, taken together with the applicable presumption of innocence, establishes that manual delivery of the correspondence "to the person to whom it was directed, to wit, the appellant, was accomplished."

Implicit in appellant's contention is the urging that the Government failed to prove appellant had taken the correspondence in question before it had been delivered to the person to whom it was directed. Appellant impliedly states to this Court that such evidence could be shown either by direct or circumstantial proof, but, in submitting this rather narrow issue to the Court, appellant refers very little to the evidence which was adduced at the time of trial. When any such reference was made, it was only to the evidence offered by the Government, that is, that it appeared "that the prosecution failed to prove the elements of wrongful taking prior to delivery, * * *."

The Government respectfully submits to this Court that not only was overwhelming proof admitted during the Government's case that appellant was not connected with any of the addressees on the correspondence in question and that he thus took the mail with intent to obstruct the correspondence and before it had been delivered to

the person to whom it was directed, but that appellant is endeavoring to improperly limit the scope of review by this Court.

In *Gaunt v. United States*, 184 F. 2d 284 (1st Cir. 1950) appellant raised a contention with respect to the sufficiency of evidence as to wilfulness. The Court of Appeals pointed out at page 290:

“The defendant by offering evidence on his own behalf elected to abandon his motion for acquittal made at the close of the Government’s case and to rely upon a subsequent motion to the same effect made at the close of all the evidence, *United States v. Goldstein*, 2 Cir., 168 F. 2d 666, 669, 670; *Mosca v. United States*, 9th Cir., 174 F. 2d 448, 450, 451, and cases cited which he made, so that this later motion is the only one for consideration on this appeal. Hence the *sufficiency of the evidence as a whole* to establish the defendant’s wilfulness *must be considered, not merely the sufficiency of the evidence offered by the Government alone* on that issue. And an examination of all the evidence convinces us of its sufficiency with respect to the defendant’s wilfulness.” (Emphasis added.)

It is apparent that the scope of review on appeal on a question of insufficiency of the evidence is not limited to proof adduced during the Government’s case. The *entire* evidence in the case must be considered in determining whether or not the case fails with respect to proving the wrongful taking prior to manual delivery to the addressee.

In *Connolly v. United States*, 249 F. 2d 576 (8th Cir. 1957), it was very clearly brought out that:

“In considering the question of the sufficiency of the evidence to go to the jury and to sustain the verdict *we must view the evidence in a light most favorable to the prevailing party*, in this case the Government, and the prevailing party is entitled to all such favorable inferences as may reasonably be drawn from the facts and circumstances proven. *If when so viewed, reasonable minds might reach different conclusions, then the issue is one of fact to be submitted to the jury and not one of law to be determined by the Court * * **”. (Emphasis added.)

In that case the appellant had contended the motion for judgment of acquittal or new trial should have been granted because the evidence was as consistent with innocence as with guilt.

The same point was made in the case of *Small v. United States*, 255 F. 2d 604 (1 Cir. 1958), where the appellant had moved for an acquittal at the close of the Government's case and also at the end of trial. The Court of Appeals stated that the issue before it was whether the evidence “viewed in the light most favorable to the Government was sufficient to support a verdict of guilty. * * *”.

See also:

United States v. McNeill, 255 F. 2d 387 (2d Cir. 1958).

Looking at *United States v. Nystrom*, 115 Fed. Supp. 500 (U. S. D. C., W. D., Pa. 1953), we find that:

“The Court, in passing on a motion for judgment of acquittal, must determine whether upon the evi-

dence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inference of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.

* * *

“In doing this the Court must assume the truth of the Government’s evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom * * *.”

In *United States v. Sylvanus*, 192 F. 2d 96 (7th Cir. 1951), it was put in this fashion:

“* * * we conclude that it cannot be said that the trial judge should not have submitted the issue to the jury. This is not a trial de novo. We do not weigh the evidence but determine only that it was such that the Court did not err in denying the motion for acquittal.”

Guided by the principles set forth in the above cases, this Court must look to the whole of the evidence to determine whether or not the proof failed in connection with one of the elements of the charges. A scrutiny of the entire case leaves no doubt but that it was *not* left up to surmise or conjecture that appellant was not one of the addressees to whom the items of mail were directed.

Turning to appellant’s own testimony, it is significant to note that he never claimed to be associated in any way with the people or the firms to whom the correspondence was addressed. As a matter of fact, he said that he went out looking for work on the morning of February 21, 1959, right after he had breakfast. The work that he was searching for was not that connected with an importing business, such as Irving Blitz had at

421 South Wall Street, or with a wholesale jobber, such as Philip Jaffe was at 338 East Fourth Street, or with manufacturing picture frames which Bert Goldner did at 421½ South Wall Street or anything to do with the business of the Hays Company at 311 East Fourth Street. Appellant simply testified that his business was that of being a *cook*. He further testified that *he had not been employed at all during the month of February 1959.*

Appellant did not base his defense on an explanation as to why he had mail in his possession addressed to other firms or persons, but denied that he had had any letters or checks at all in his possession on that day.

Under the Court's instructions, the jury had to weigh the credibility of the witnesses, find the facts which actually happened and draw reasonable inferences from those facts. The question of whether or not the defendant had taken the letters before they were manually delivered to the addressee was submitted by the Court in his instructions to the jury as a question of fact. Now, on review, it is clear the evidence as a whole showed that reasonable minds could easily conclude appellant was not associated with any of the firms or persons to whom the correspondence was addressed, especially in the light of his own testimony. Even in the Government's own case, particularly since the evidence must be viewed in a light most favorable to the Government, the circumstances could only lead a reasonable mind to draw the inference appellant was a thief and not authorized in any way to receive the mail.

Mr. Walter, a post officer carrier, testified, in part, that on Saturdays during February 1959, he made just one delivery about 8:30 in the morning and would have mail for every stop, including both "Western Frame" and

"Blitz". He stated that when he dropped mail in Mr. Blitz's place of business he put it through the mail slot in the door and the mail then fell to the floor. Mr. Blitz himself testified that on February 21, 1959 he was out of town and the latch on his door was locked. He further testified that there was about an inch between his floor and the bottom of the door where the mail slot was located. Mr. Blitz never got the check for \$284.20 which was received in evidence, but he got another check from the company which had mailed it to him after the post office authority had notified him of the circumstances. Obviously since the check had been stolen, the original was cancelled and another one was issued to him in its place.

Another letter carrier who had a route in the general area of Fourth and Wall Streets in Los Angeles testified that he saw appellant on Saturday, February 21, 1959, and Mr. Devine was standing in a doorway at 356 Los Angeles Street. The business was closed there on that day and the door was locked. When the carrier saw appellant, the latter was trying the door knob at that address.

This carrier, Frank Harding, testified that he delivered mail to the Jaffe Company on Saturday, February 21, 1959 and that company was locked up on that day. The mail carrier always tried the door to see if there was someone there and there was no one at the place on that date. He further testified that when one would pass by the front of the company's door one could see down on the floor where the mail would drop through the slot in the door.

This witness also testified that the Hays Company was also on his route and he actually delivered mail to the Hays Company on Saturday, February 21, 1959. The door

was locked at that time and the sign said "Closed". As a matter of fact there was no one actually at the Hays Company on that day.

It is important to remember that each one of the firms concerned appeared to involve a different type of business. It is not reasonable to conclude, in view of the light of all the evidence, that a *cook*, who was out of work that particular month and looking for a job as a cook, could have been associated in any business way with four different types of enterprises. Further the 360 South Los Angeles Street address where the appellant was seen trying the door knob by one of the carriers contained two other companies called "David of Hollywood" and "The Field Company". It is also to be noted that the same carrier had never met the appellant personally before the date in question, although he had been on his route for approximately a year and a half.

Mr. Jaffe testified that the check for \$85.00 was due to his store because of a business transaction with another firm. Mr. Blitz testified to a like effect. The same was true of the mail addressed to the Hays Company which was found by the post office inspectors. Mr. Yamamoto stated that it involved a business transaction had by the Hays Company with Balfour-Guthrie & Company. In other words, each one of the pieces of mail had to do entirely with the business affairs of each of the firms involved.

Mr. Jaffe also testified that he had received another check in lieu of the one which was contained in the envelope. This was because of the fact that the original check was missing. Certainly it cannot reasonably be said that a duplicate check would have been issued in these

instances if appellant had had any association with each company which would have warranted his receiving the checks.

As was the case with the Blitz Store, both the premises operated by Philip Jaffe and the Hays Company contained a door at the front of the establishment which was a certain space above the ground. Furthermore, the doors had glass centers so that in each case one could look through and see whether or not there was mail on the floor.

Not only were Blitz and Jaffe not at their stores on Saturday, February 21, 1959, the doors being padlocked, but there was no one at the Hays Company that morning. Thus, in each case, the defendant was found with correspondence which had been delivered that very morning to an establishment that was locked, no one being present on the premises. There was no testimony of keys being found on his person which would have gained him entrance to the doors and Mr. Devine himself did not claim to have such keys.

Not only does the testimony of appellant himself and the evidence showing the above facts demonstrate that appellant had no connection at all with the firms involved, but the testimony of the postal inspection service men showed his activities were not those of a person who was authorized to receive the mail, but rather one who was surreptitiously taking mail without authorization. Mr. Carey testified as to the appellant's movements on that day, which included a great deal of walking around the streets, even retracing his own footsteps on at least one occasion. In fact, it was so difficult for the men to keep track of appellant by automobile, that they finally got out of the car and observed his movements on foot.

Appellant finally walked up to the corner of Fourth and Wall and stood on the stoop of a store at that point. Mr. Carey actually walked by appellant at that point and saw him discard an envelope which resembled the Service Exchange letter (the check being later found on his person) since it had a blue and yellow return address on the upper left hand corner. Appellant then moved across the street to another corner on the intersection and the postal service men saw that he appeared to have some envelopes in his hand. He was seen to open something that had an orangish enclosure which he threw in the gutter. In other words, Mr. Devine was throwing away an enclosure which had business significance to the Hays Company. Later, when Mr. Carey went back to practically the same spot where appellant had been standing, he found other such exhibits. Here we find appellant in possession of correspondence which related to the regular course of various businesses carried on by these firms, throwing away certain significant material in the gutter. This hardly would have been the action of a person associated with any of those firms.

When Mr. Carey walked by the Philip Jaffe establishment on that day he looked in through the glass windows and noticed that there was mail on the floor just behind the door. At that time appellant was not too far behind him on the sidewalk. After Mr. Carey and Mr. Padgett continued to the corner of Fourth and San Pedro they stopped at a doorway and watched appellant.

As the two men continued to observe him, he eventually came up from the bottom of the door with a letter in his hand. In other words, he never went in the door, but managed to withdraw the envelope from outside the locked doors. Appellant was shuffling his feet in a maneuver to

withdraw mail which had fallen inside on the floor through the mail slot. The only inference which could be drawn is that he had injected some slender object underneath the crack in the door and managed to lay it over the mail. This being done the shuffling of his feet apparently brought the letters back underneath the crack in the door into his possession. When any pedestrians passed by, the post office men observed that appellant would stop the movements of his feet. When the coast was clear, so to speak, he would then start manipulating his feet again and bending over.

When appellant was apprehended, he had Exhibit No. 12, which was a letter addressed to Philip Jaffe at that address and it was still unopened. On the witness stand Mr. Jaffe opened it and it was found to contain a check. Appellant handed Mr. Carey the letter and said: "I want to go back to jail." When asked if he had any other mail he admitted that he did and said he would give it to Mr. Carey in a minute. He then pulled out two additional letters and handed them to the post office man. As they all started walking up the street, appellant drew out Exhibit No. 9, the U. S. Rubber Company check and *threw it on the street crumpled up in a ball*. It is also significant to note that when appellant spoke at that crucial moment, he made the statement "I want to go back to jail."

The only inference which could be drawn from all his actions as set forth above is that he had stolen the mail.

As indicated above, Exhibits No. 17 and No. 19, the other two checks, were found on appellant's person at the post office where he was taken after his arrest.

(It should be remembered that the sentences on each Count were concurrent. If any of the counts are affirmed, the conviction should stand).

The Court's attention is also directed to the fact that the crumbled check which appellant threw to the ground was one which the United States Rubber Company in New York had mailed to Western Frame Company in Los Angeles at 421½ Wall Street. That transaction was offered as a similar offense to prove intent and knowledge of the defendant in connection with the charges set forth in the indictment. In that particular instance, Government counsel did ask Mr. Goldner, who was the manufacturer of picture frames at that address, if Mr. Devine was employed by that company. Goldner testified Devine was not employed by his company, Goldner had never seen appellant before the trial and had never had any business dealings with him. The representative of the United States Rubber Company also testified that that firm had no accounts payable to John F. Devine or John Francis Devine. The name of the payee on the check was obliterated and on the reverse side thereof there appears to be the endorsement "John F. Devine." Appellant himself admitted that it looked like his signature. Mr. Goldner also testified that the endorsement on the reverse side of the check was not his and that he had never given anyone the authority to place that endorsement on the exhibit. The United States Rubber Company had issued a duplicate check to Mr. Goldner when it was ascertained that the postal authorities had possession of the original.

In the transaction involving the Western Frame Company, we then have a situation where a check was sent through the mail to Western Frame in a business transaction and not received by the addressee. The testimony was quite specific that Devine had no association with Goldner at all and yet the mutilated check was found on Devine's person on Saturday morning, February 21, 1959.

Thus the appellant's intent to obstruct the correspondence of the various firms and persons named in the indictment before such correspondence had been delivered to the person to whom it was directed was bolstered by the evidence of the similar offense, where the evidence was quite specific as to his lack of association with the addressee.

While it is true that Government counsel could have easily disposed of this question on appeal by specifically asking each one of the addressees as to lack of association with appellant, such was not done directly, except in connection with the incident involving the Western Frame Company. It may well be that such specific questions were not asked on this point in connection with the witnesses Jaffe, Blitz and Yamamoto, because Government counsel was somewhat distracted on this point by the abundance of circumstances which could only lead to the conclusion that Devine was a thief, and not associated in any way with the three business houses. However, as appellant has stated in his brief, the elements of the offense can be proved by circumstantial evidence, as well as direct evidence, and that was done in this case.

In connection with the appellant's second point on appeal, he declares that the Court erred in refusing to declare a mistrial for prejudicial misconduct on the part of the prosecuting attorney.

It should be noted that appellant did not request the Court to declare a mistrial for alleged prejudicial misconduct on the part of Government counsel or ask for any remedial action at the time the incident occurred upon which this complaint is based. All that counsel for appellant stated was as follows: "Your Honor, counsel displays an implement here that has in no way been identi-

fied with this case. We have no evidence on it. I think this is highly prejudicial.” Thus appellant complains of a failure to declare a mistrial, when no suggestion was made by him to the Court that such be done.

In any event, counsel for the Government, in endeavoring to illustrate the only reasonable conclusion which she contended could be drawn from the circumstances, particularly those which happened outside of the locked Jaffe doorway, stated to the jury:

“Now, ladies and gentlemen, I think that the only reasonable inference you can draw is that the defendant had *some way* to get this mail *out* from underneath the doorway. *This isn't in evidence and I don't say the defendant had this, but—*” (Emphasis added).

Thereafter, in response to the above quoted remarks made by counsel for appellant, Government counsel further stated: “*I don't claim it is in the case. I want to use it as an illustration. I can talk about it, anyhow*” (Emphasis added).

The Court then went on to advise Government counsel that he did not think she should refer to anything except the evidence in the case. Judge Westover said “If you are referring to anything that is not in evidence, please don't do it.” Counsel for the Government then told the Court that she would not waste time arguing the point and would proceed.

After the above mentioned colloquy between Court and counsel with respect to the implement which Government counsel only *started* to use as an illustration, counsel for the Government then proceeded to make the statement

quoted herein under the summary of facts. In effect she told the jury that anybody could figure out that the maneuvering of appellant at the Jaffe door was to get underneath the door some kind of a heavy strap or something that was firm enough to go in and rest on the mail. In this way, she argued, the implement could be laid on the letters so that they could be dragged out underneath the doorway.

Thus, when counsel for the Government was told by the Court not to refer to anything not in evidence, she refrained from proceeding with the illustration which she had started to use. Instead, she merely argued what were believed to be the only reasonable inferences from the circumstances which occurred. There was no objection to this argument by counsel for appellant. In fact, as shown before, he had the chance to, and did, make his own argument with respect to any alleged wire or contrivance which may have been put under the door [Rep. Tr. 245, 246].

As indicated above, counsel for the Government made absolutely no contention that the implement, with which she started to illustrate her argument, was in evidence or had been in the appellant's possession. Whether, on hindsight, it will be said to have been inappropriate or not, it can hardly be said to have been prejudicial to appellant in view of the fact Government counsel clearly made no claim it was in evidence and only started to use it as an illustration. Further, she continued in the argument without the object to argue the inferences which should have been drawn from the strong circumstances of guilt.

As also set forth in the summary of the facts, the Court instructed the jury that a conviction can be based upon circumstantial evidence, that is, a proof of a chain

of circumstances pointing to the commission of an offense. He further said that "Statements and arguments of counsel are not evidence in the case, unless made as an admission or a stipulation of facts, * * * you are to consider only the evidence in the case. * * *" The Court made similar statements when the case started.

When the instructions had been completed, counsel for the defendant stated that he had no objections to the instructions read to the jury. He offered no suggestions as to any additions to the instructions and appeared to be satisfied with them.

It appears that all of the evidence taken at the time of trial was overwhelming as to the guilt of the defendant on all three counts of the indictment. As shown above, the post office men themselves actually *saw* the defendant take a letter from the outside of the Jaffe door after engaging in surreptitious movements. Certainly it could not be said that, in the setting of the entire trial, a fleeting endeavor by Government counsel to *illustrate* a point by beginning to use an implement, could have made any difference in the verdict which was rendered by the jury. They were carefully instructed by the Court that they were to consider only the evidence in the case and that the statements of Government counsel did no more than to argue the inferences which should be drawn from those facts.

In presenting a case, a prosecuting attorney may make any reasonable comment on the evidence and may draw such inferences from the testimony as would support his theory of the case. The *Mellor* case, *infra*, involved certain statements made by the prosecutor and the Court further said that to constitute reasonable error, the

language used must have been plainly unwarranted and “*clearly injurious*”. (Emphasis added)

Mellor v. United States, 160 F. 2d 757 (8th Cir. 1957).

In the case of *Sanders v. United States*, 238 F. 2d 45 (10th Cir. 1956), the prosecutor used a crowbar and a pinchbar, which had not been admitted in evidence, for the purpose of illustration. There the Court held that it was not error since the circumstances brought out during evidence were such as to lay a foundation for the use of such implements as *illustrations*.

See also:

United States v. DiCanio, 245 F. 2d 713 (2d Cir. 1957) cert. den. 355 U. S. 874;

People v. Caldaralla, 329 P. 2d 137, 163 A. C. A. 31;

People v. Cox, 76 Cal. 281, 18 Pac. 332;

People v. Durrant, 116 Cal. 179, 48 Pac. 75.

The above cited cases involved the use by the prosecution of some object to illustrate argument.

In conclusion, it is submitted that the verdict of this jury was only based upon the evidence, which, as indicated above, was overwhelming as to the guilt of appellant. The remarks made during opening statement were only those of ultimate fact which the prosecution claimed would be proved, not indicating whether it would be by force of circumstances or through direct evidence, or both. The instructions of the jury were apparently satisfactory to appellant at the time of trial and the incident complained of during closing argument was a minor incident during the course of the entire trial.

Counsel for appellant claims that no instruction of the Court could have possibly removed the prejudice which appellant's case suffered, but the Government submits that no prejudice was suffered. The illustration was immediately abandoned when the Court advised Government counsel not to refer to anything which was not in evidence.

Thus, it is urged that the conviction of the appellant below should be affirmed.

Respectfully submitted,

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No. 16,556

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JOHN D. DUNCAN,

Appellant,

vs.

PAUL J. MADIGAN, Warden, United
States Penitentiary, Alcatraz, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE

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FILED

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PAUL P. O'BRIEN, CLERK

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No. 16,556

IN THE

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JOHN D. DUNCAN,

Appellant,

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PAUL J. MADIGAN, Warden, United
States Penitentiary, Alcatraz, Cali-
fornia,

Appellee.

BRIEF FOR APPELLEE

JURISDICTION

Jurisdiction is founded under Title 28 United States Code, Section 253.

STATEMENT OF THE CASE

On September 14, 1955, appellant began the service of a 2 to 4 year sentence in the prison system of the State of Maine for the state crime of breaking and entering. While under service of this sentence, appellant attempted to escape from the Maine State Prison and for this crime was sentenced on October 10, 1956 to 8 to 16 years consecutively to the previous sentence.

On May 22, 1957, pursuant to a contract between the State of Maine and the United States government

and in accordance with the terms of Title 18 United States Code Section 5003 (see Appendix I) appellant was transferred to the United States Penitentiary at Alcatraz. From there he sought habeas corpus in a petition filed on May 5, 1959.

On May 12, 1959, this petition was denied and on July 23, 1959, appellant was granted leave to appeal in forma pauperis.

ARGUMENT

I

Appellant's primary argument is that Section 5003 does not authorize the imprisonment of other than youthful offenders by the federal government. In answer to this it should be noted that codification of the Act under Part 14 of Title 18, Correction of Youthful Offenders, does not mean that the Act is inapplicable to other offenders. The title of the Act itself furnishes the pertinent phraseology as to its purpose. It is "An act to authorize the Attorney General to admit persons committed by state courts to Federal *penal* and correctional institutions when facilities are available." (Emphasis added.) Of necessity the codification of legislative acts sometimes seems to "pigeon-hole" a statute which by its very terms applies to multiple situations and categories. Thus PL 865, 85th Cong., 1st Sess. (1950), was entitled, "An act to provide a system for the treatment and rehabilitation of youth offenders, to improve the administration of criminal justice, and for other pur-

poses." Sec. 4 of that Act, which provides for an Advisory Corrections Council, is codified as 18 U.S.C. 5002 (under Youth Offenders) even though it is obviously not confined to this category. In 1952 the present section 5003 was added. Like 5002, while it is applicable to youthful offenders it is not confined to that classification. Another illustration is a new section, 4209, which is made part of Chapter 311, captioned *Parole*, although 4209 raises age of youth offenders from 22 to 26.

Determinative of this issue is the statement on page 3188, Title 18 of the United States Code, 1958 ed. Sec. 18 of the Act of June 25, 1948, ch. 645, 62 Stat. 862, provided that: "No inference of a legislative construction is to be drawn by reason of the chapter in Title 18, Crimes and Criminal Procedure, as set out in section 1 of this Act, in which any particular section is placed, nor by reason of the catchlines used in such title." The Act of June 25, 1948 codified and enacted into positive law Title 18. Later, in 1952, section 5003 was added.

House and Senate reports on the legislation in question, cited by appellant, indicate that the usual request from a state for federal custody of a state prisoner relates to juveniles and drug addicts. Obviously a drug addict is not necessarily a youth offender and Congress therefore definitely considered the Act as applicable to other than youthful offenders. The explanation of "treatment" in the House Report (cited by appellant) does not limit the term to medical treatment or treatment under the Youth Corrections

Act. The term "treatment" is in fact used in a number of statutes codified under Part III of Title 18, Prisons and Prisoners. Thus 18 U.S.C. 4081 reads:

"Sec. 4081. Classification and *treatment* of prisoners.

The Federal penal and correctional institutions shall be so planned and limited in size as to facilitate the development of an integrated system which will assure the proper classification and segregation of Federal prisoners according to the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and *treatment* of the persons committed to such institutions. (June 25, 1948, ch. 645, Sec. 1, 62 Stat. 859.)" (Emphasis added.)

While not specifically referred to as treatment, the rehabilitation process afforded by prison industries (18 U.S.C. 4121 ff), is certainly a type of "treatment" for prisoners. (And cf. 18 U.S.C. 4001, which provides that the Attorney General may establish industries and provide for treatment.)

Finally, it is significant that the Senate Report on the bill (S. 2160) which became 18 U.S.C. 5003 does not include the above-mentioned explanation as to treatment nor did the comments of the Deputy Attorney General on this Department-sponsored bill show any intent to limit the provisions to youth offenders. (See letter from Deputy Attorney General quoted in House and Senate Reports.) On the con-

trary, the approach was one of reciprocity—*i.e.*, the legislation was intended to provide the same service for state prisoners which states provide, under 18 U.S.C. 4002, for federal prisoners.

II

Appellant's second argument involves the constitutionality of Section 5003 of Title 18 U.S.C. Appellant states that the federal government is a government of limited and enumerated powers. Appellant then argues that since the provision for the boarding of state prisoners in federal prisons is not in pursuance of any of the powers granted in Article I Section 8 of the Constitution, Section 5003 of Title 18 is an invasion of the state police power and the reserve powers of the states.

A complete answer to this question is found in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288. There the Court rejected similar arguments as concerning a contract for the sale of electric power, stating that:

“Authority to dispose of property constitutionally acquired by the United States is expressly granted to the Congress by Section 3 of Article IV of the Constitution. This Section provides:

‘The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.’

“To the extent that the power of disposition is thus expressly conferred, it is manifest that the Tenth Amendment is not applicable. . . .”
297 U.S. at 330.

III

Appellant also complains that he is denied the equal protection of the laws by the state of Maine, in that the statutes of Maine, under which his imprisonment in Alcatraz was contracted for, give the Maine authorities the latitude to deny persons the equal protection of the laws. The essence of the complaint here is that the warden may, but does not have to certify on persons who are detrimental or incorrigible to be transferred to federal custody.

First of all, it would seem that this objection assumes a construction of the state of Maine statutes. It is the state Courts which have the first and last word as to the meaning of state statutes and the Supreme Court has indicated its disapproval of the anticipatory declarations involving state statutes.

Public Service Commission v. Wycoff, 344 U. S. 237, 247;

Alabama State Federation of Labor v. McAdory, 325 U. S. 450.

Furthermore it would seem that any complaint by the appellant concerning the denial of equal protection of the laws would have to show some discriminatory application of this statute. On its face, the classification of detrimental or incorrigible persons is reasonable and logical and the discretion granted the warden in determining which prisoners to transfer is

in line with the necessities and realities of prison administration. As such it clearly does not run afoul of the equal protection clause.

Appellant's further arguments concerning his "banishment" are unrealistic under the facts of this case. Appellant merely is being transferred to an institution better able to handle discipline problems such as himself. Even though the institution happens to be out of his state, appellant cannot claim a constitutional right to be imprisoned in an area of his own choosing. Certainly, appellant cannot force the state of Maine to build and maintain a maximum security institution for himself and the very few others who require that type of incarceration.

A similar contention made by a state of Maine prisoner imprisoned in a federal penitentiary in Pennsylvania was rejected by the District Court in an unpublished opinion. (See App. II.)

Accordingly, the judgment of the United States District Court should be affirmed.

Dated, San Francisco, California,
October 27, 1959.

Respectfully submitted,

LYNN J. GILLARD,
United States Attorney,

JOHN KAPLAN,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendices I and II Follow.)

Appendices.

Appendix I

(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

(b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.

(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

T. 18 U.S.C. Sec. 5003 (a)(b)(c).

Appendix II

United States District Court
For the Middle District of Pennsylvania
Habeas Corpus No. 349

Thomas Pratt,	Petitioner,
vs.	
Charles R. Hagan, Warden United States Penitentiary, Lewisburg, Pennsylvania,	Respondent.

MEMORANDUM

Thomas Pratt, a prisoner of the State of Maine, was transferred from the Maine State Prison to a federal penal institution in this district, namely, the United States Penitentiary, Lewisburg, Pennsylvania. This was done pursuant to the Act of May 9, 1952 (18 U.S.C. § 5003) which provides, inter alia:

“(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.”

He now seeks, in forma pauperis, the issuance of a writ of habeas corpus. His contention is that an agreement such as provided by the Act is a "direct violation of your petitioner's Constitutional Rights," that he "did not sign any extradition papers," and that "Your petitioner did not commit a Federal Violation, therefore, your petitioner is being held in a Federal Penitentiary illegally."

The analogous or possibly more aptly termed "converse" situation is that of placing federal prisoners in State institutions where the State has expressed a similar willingness to accept. In 72 C.J.S. Prisons § 3, under the caption "Use by United States of State Prison or County Jail," it is stated:

"In response to a recommendation embodied in an early resolution of congress various states have made it the duty of their officers to receive and keep in the state or county prisons any prisoners committed thereto by process or order issued under the authority of the United States, as though they had been committed under the authority of the state, provision having been made by the United States for the support of such prisoners; * * *."

In 1815, Justice Story in *Randolph v. Donaldson*, 13 U.S. 75 (9 Cranch 75), pointed out that

"Congress, by a resolution passed the 23d September 1789 (1 U.S. Stat. 96), recommended to the several states to pass laws making it the duty of the keepers of their jails to receive and safe keep prisoners committed under the authority of the United States, * * *. In pursuance of the

former recommendation, the legislature of Virginia, by the act of 12th November 1789, ch. 41 (Revised Code 43), made it the duty of the keepers of the jails within the state, to receive and keep prisoners arrested under the process of the United States, * * *.”,

and in the opinion found no objection to such an arrangement nor did he express any doubt as to its constitutionality.

In the legislative history,¹ prior to the passage of the Act of 1952, House Report No. 1663, stated, inter alia:

“The Committee on the Judiciary, to whom was referred the bill (S. 2160) to authorize the Attorney General to admit persons committed by State courts to Federal penal and correctional institutions when facilities are available, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

“The purpose of the proposed legislation is to authorize the Attorney General, when Federal facilities are available, to contract with State and Territorial officials for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such States and Territories.

* * * * *

“State prisons for many years housed and cared for Federal prisoners—until the Federal Government built its own institutions. Today, by

¹1952 U.S. Code Congressional and Administrative News, Page 1420.

statute, (sec. 4002, title 18, U.S.C.) the Attorney General is authorized to contract with State officials for the care and custody of our Federal prisoners. Pursuant to this authority, there were on August 31, 1951, approximately 3,000 Federal prisoners serving short sentences or awaiting trial in State, county, and Federal institutions. The committee sees no reason why Federal facilities and personnel should not, in turn, be made available for State offenders, provided, of course, the Federal Government is reimbursed for any expenses involved. * * *."

The Act of 1952, as can be clearly seen from the historical background, provided for nothing unusual and in no sense constituted any invasion of the rights of prisoners. The constitutionality of such legislation is no longer open to doubt.

The petition for writ of habeas corpus will accordingly be denied.

July 10, 1959.

/s/ Frederick V. Folmer,
United States District Judge.

ORDER

NOW, to wit, July 10, 1959, for the reasons set forth in the foregoing Memorandum, the petition of Thomas Pratt for writ of habeas corpus is accordingly denied, and the Rule to Show Cause issued thereon is discharged.

/s/ Frederick V. Follmer,
United States District Judge.

No. 16557 /
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RONALD RALPH PEPENDREA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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PAUL P. O'BRIEN, CLERK

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No. 16557
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RONALD RALPH PEPENDREA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

A.

Statement of Jurisdiction.

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging the appellant guilty under both counts of a two-count indictment. Each count charged appellant with the robbery of a national bank under Title 18, United States Code, Section 2113(a)(d) [T. R. 10].¹ Count One charged a robbery of the Bank of America National Trust and Savings Association, Vermont-Melbourne Branch, located in Los Angeles County, State of California. Count Two charged a robbery of the Bank of

¹T. R. refers to the Reporter's Transcript of Proceedings.

America National Trust and Savings Association, Bakersfield Branch, located in Kern County, State of California. Each said County is within the Central Division of the Southern District of California.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code.

This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

B.

Statement of the Case.

The indictment, in two counts, charges, in Count One [T. R. 11] that on or about July 29, 1958, the appellant, together with an accomplice, Lawrence Allison Hobart, "by force and violence, knowingly and wilfully took from Mrs. Carol Davis, teller, \$1,474.00" belonging to the bank.

In Count Two it was charged that appellant, on or about July 22, 1958, "by force and violence, knowingly and wilfully took from Mrs. Lois Marie Fox, teller, \$300.00" belonging to the bank.

The accomplice, Hobart, was tried along with appellant in the instant trial. The jury did not agree on a verdict [T. R. 325] as to Hobart. Hobart was subsequently tried and convicted and he has initiated an appeal to this Court which has not as yet been brought on to hearing.

The jury returned a verdict of guilty as to appellant on both counts of the indictment [T. R. 314]. The jury also returned special findings as to each count [T. R.

315] in which it concluded that appellant did not put in jeopardy the lives of the tellers in question by the use of a dangerous weapon.

C.

Statement of Facts.

The case was tried from the inception of the trial to its conclusion upon the assumption that the indictment charged a robbery "by force and violence or by intimidation." This assumption was apparent in the remarks of the prosecuting attorney in his opening statement [T. R. 14] wherein he stated:

"The first element is that the Government must prove to your satisfaction beyond a reasonable doubt that by force and violence or by intimidation the defendants, or one of them . . . took from the person or presence of another person . . . money belonging to or in the care, custody, control, management or possession of a bank."

It was further assumed in the opening statement that the question of intimidation was an essential element of the crimes charged [T. R. 13].

This assumption was also made by the Court in its instructions [T. R. 292] in that it instructed in the words of the statute that a robbery is committed by taking the property of another: "by force or violence or by intimidation."

There was never any intimation on the part of either defendant during the entire trial that the use of the word "intimidation" was regarded as improper. Each defendant

was informed that he might object to the instructions [T. R. 286] and concerning some parts of the instructions each defendant did object [T. R. 307]. However, neither defendant objected that the instruction concerning intimidation was improper. No objections were made to the remarks of the prosecuting attorney in his opening statement. No objections were made to similar remarks of the prosecuting attorney on closing argument [T. R. 280].

On the basis of the entire record it can fairly be concluded that each defendant assumed, as did the Court and the Government, that "intimidation" was a part of the crime charged. The question is now raised entirely as a matter of hindsight unsupported by any objection at the time of trial.

In support of the crimes charged in the indictment the two bank tellers testified for the Government. Lois Marie Fox, teller of the Bank of America, Bakersfield Branch [T. R. 25, 26] positively identified appellant as the person who robbed her on July 22, 1958. Mrs. Carol Davis, teller of the Bank of America, Vermont-Milbourne Branch [T. R. 50], also described appellant in considerable detail [T. R. 51], and identified him as the robber [T. R. 52]. These positive identifications were further fortified in each case with positive identification of the distinctive clothing worn by appellant at each robbery: an ivy-league cap, a striped shirt worn outside the trousers, and khaki-colored trousers [T. R. 51, 30].

In the case of each robbery the *modus operandi* was identical. The robber walked up to the window of the teller's cage, laid a money bag on the counter, and said, "Fill it up." [T. R. 27, 53]. Each teller thought he was kidding or fooling [T. R. 27, 53] and in each case the robber said something to the effect that he was not kidding and again ordered the teller to fill up the bag, this time exhibiting a gun [T. R. 25, 53]. Following this exhibition, each teller acceded to the demand and filled up the bag with the money that was on her counter.

Witness Fox testified:

"I was wondering actually what I should do, because I didn't want to give him the money and yet there was the gun." [T. R. 29].

She further testified:

"He pulled his shirt back and exposed the gun as he was telling me he was not kidding." [T. R. 38].

She became afraid [T. R. 48] although the gun was never actually pointed at her [T. R. 49].

Carol Davis testified:

"The Witness: He said, 'Fill it up.'

And I said, 'With what?'

And he said, 'With everything you have got in the drawer,' and I laughed, thinking he was just joking around.

I said, 'You shouldn't fool like that. Now, what do you want?'

He said, 'I am not fooling,' and he picked up his shirt and underneath it was a white undershirt with a gun stuck in the belt underneath the pants.

He said, 'Now, do as I say.'

I realized then he wasn't kidding and there was no one else around and I became scared and I just started looking at him real good, figuring if there wasn't anything else I could do, I could see what he looked like.

I took the money I had just put in my drawer and stuffed it in the bag, and I was sitting on a stool during this time and I sort of got up to rise and he said, 'don't move when I leave, or else,' and he turned around. As soon as he turned around I ran to my manager in the bank, telling him what happened."

Mrs. Davis further testified:

"A. Well, he lifted his shirt and threatened, and said, 'I am not fooling,' and I saw a gun there; I just knew it was.

Q. You say you saw a gun. Was that all you saw, was the top— A. The top half.

Q. When he threatened, did he do anything other than simply say, 'I am not fooling?' A. That's right. But the way he said it.

Q. Did that frighten you? A. Excuse me?

Q. Did that frighten you, when he said, 'I am not fooling?' A. Yes, at that point I became frightened."

Following the commission of the offenses charged in the indictment the appellant was interviewed by a Special Agent of the Federal Bureau of Investigation, Thomas

B. White, Jr. This interview took place at the Federal Correctional Institution at La Tuna, Texas [T. R. 65] where appellant was a prisoner in connection with an unrelated offense [T. R. 68]. Prior to the interview, appellant had been advised of his constitutional rights [T. R. 66, 67]. Appellant denied guilt on the first interview [T. R. 67]. Subsequent to this a prison break occurred in which appellant was involved [T. R. 67]. After this incident appellant called for Mr. White and told White that he wanted to talk about the robberies [T. R. 69]. Appellant agreed that the prison break, and his subsequent incarceration in the "hole" had nothing to do with Mr. White [T. R. 86]. Appellant attempted to explain his confession to Mr. White with the explanation that he gave this confession as a means to get out of the hole [T. R. 88] and that he made false statements in the confession because he believed he could later thereby prove that the confession was not a true one. This remarkable assertion was followed by a series of admissions that most of the material parts of the confession were in fact true [T. R. 89-94]. The confession, in two written statements, was received in evidence as Plaintiff's Exhibit 8 and 9 [T. R. 115, 104].

Appellant was sentenced on April 28, 1959 [T. R. 331]. Before sentence the Court ordered a pre-sentence investigation and report by the United States Probation Office [R. 29].² Before imposing sentence the Court briefly reviewed some of the previous convictions of this

²R. refers to the Transcript of Record.

appellant [T. R. 331]. the Court gave a full explanation to appellant in which it set out the reasons for the sentence being imposed [T. R. 333] and the Court thereupon imposed the maximum term of years permissible under each count [T. R. 334].

D.

Statute Involved.

Each count of the indictment was based upon Title 18, United States Code, Section 2113, which provides in pertinent part as follows:

“(a) Whoever, by force and violence, or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association . . . shall be fined not more than \$5,000 or imprisoned not more than 20 years, or both.”

A further portion of this statute is also applicable. Subsection (d) provides, in part, as follows:

“Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than 25 years, or both.”

ARGUMENT.

I.

The Supposed Variance Between the Charge and the Evidence Now Asserted by Appellant Was Waived by His Failure to Object Thereto at the Time of Trial.

The objection of appellant, that there exists a variance between the charge and the evidence adduced at the time of trial, cannot be asserted on this appeal unless it was urged in the trial court.

Harris v. United States, 227 U. S. 340;

11 Cyc. of Federal Procedure, Sec. 42.232;

Swafford v. United States, 25 F. 2d 581.

Stated in another way: The variance now urged by appellant is cured by the verdict.

Wilson v. United States, 158 F. 2d 659.

II.

The Defendant Was Not Misled nor Placed in Double Jeopardy by the Supposed Variance.

A variance is, of course, not material, unless the accused is thereby misled, placed in double jeopardy or prejudiced in his substantial rights.

Washington and Georgetown R. Co. v. Hickey,
166 U. S. 521;

Berger v. United States, 295 U. S. 78, 83;

Federal Rules of Criminal Procedure, Rule 52(a).

These question are factual determinations that must be made *based upon the record as compared to the charge*. The significance of the defendant's contention is neces-

sarily accentuated in a factual context where the question is a close one, a question which certainly does not exist in this record.

Wilson v. United States, 250 F. 2d 312, 325 (9th Cir.)

In the foregoing case this Court reversed a conviction in a case in which there was a failure on the part of the Court to distinguish between "wilfull failure to pay a tax" and "wilfull attempts to defeat and evade" such tax. In such a case, clearly, considerable ambiguity may arise through failure of the trial court to properly distinguish between two such difficult and, in that case, important, concepts. The distinction between the two terms meant the difference between a misdemeanor as against a felony conviction to the defendant in the *Wilson* case.

In the instant case there was no surprise to the appellant by virtue of the now-asserted variance. All parties assumed at all times during the trial that the appellant was charged under both theories. Furthermore, a conviction in this matter does not leave appellant open to another prosecution for the same offense. Under these circumstances, there is no variance affecting the substantial rights of the appellant and the now-asserted variance should be disregarded on appeal.

Smiley v. United States, 186 F. 2d 903 (9th Cir., 1951.)

III.

Inasmuch as the Evidence Established That "Force" Was Used in the Commission of the Offense, There Was, in Fact, No Variance, as Now Asserted by Appellant.

Appellant contends that there must be either one of two things charged and proved in order to avoid the stigma of variance. Appellant contends that under a charge of "force and violence" there must be actual physical violence exerted upon the person of the victim; he further contends that under a charge of "intimidation" the evidence need only be that the victim was "put in fear." (Appellant's Br. p. 2).

This contention is based upon appellant's interpretation that, from the wording of the statute, it must be presumed that Congress intended two alternative means by which the crime of robbery might be committed. It is perhaps pertinent to observe that Congress does not, in every case, neatly distinguish between the various alternatives in alternative language used by it in its statutes. Witness, for example, the words "obscence, lewd, lascivious, or filthy" in the statute dealing with the mailing of material of that general nature.

Title 18, United States Code, Sec. 1461.

This Court, and the United States Supreme Court as well, have spent considerable energies in attempting to deal with but one of the four words of the foregoing statute; as to the remaining three words, lewd, lascivious and filthy, no satisfactory definition has yet been determined upon. (See *United States v. Roth*, 237 F. 2d 796, 799; *Roth v. United States*, 354 U. S. 476.) The reason for this difficulty is rather obvious, considerable redundancy appears in the four words used in the statute.

In much the same way, the word “intimidation” is essentially redundant because of the interpretation that has been applied through the centuries to the words “force and violence.” The word “force” is defined in Black’s Law Dictionary, Third Edition, as follows:

“Power dynamically considered, that is, in motion or in action; constraining power, compulsion; strength directed to an end. Usually the word occurs in such connection as to show that unlawful or wrongful action is meant.”

The word “violence” is there defined as follows:

“The abuse of force. That force which is employed against common right, against the laws, and against public liberty. Violence is synonymous with physical force, and the two are used interchangeably in relation to assaults, by elementary writers on criminal law.”

The word “force” is perhaps better defined by reference to its synonyms. They are:

- “1. To do violence to; especially to ravish; violate.
2. *To constrain or compel; to coerce.*
3. *To impose or cause by necessity.*
4. To impel, wrest, extort etc. by violence.
5. To obtain or win by strength or struggle . . .
6. *To press or urge for acceptance;* as, to force attentions upon one.
7. To exert to the utmost; to urge; hence, to strain; to urge to, or produce by unnatural effort; as to force a laugh . . .”

Webster’s New Collegiate Dictionary, 1956 Edition.

The word “intimidate” is there described as:

“To make timid or fearful; to inspire or affect with fear; specifically to deter, as by threats; overawe; cow.”

From the very earliest days the word “force” appears to have been used interchangeably with the word “violence” and the phrase “putting in fear.” Blackstone defined “robbery” as follows:

“Open and violent larceny from the person, or robbery, by rapine of the civilians, is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear.”

2 Jones’ Blackstone 2456.

Blackstone then went on to define the elements of robbery as follows:

“1. There must be a taking, otherwise there is no robbery . . .

2. It is immaterial of what value the thing taken is: A penny as well as a pound, thus forcibly exerted, makes a robbery.

3. Lastly, the taking must be by force, or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing.”

Ibid., page 2457.

Blackstone went on to say, in referring to the indictment:

“Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by putting in fear; it is sufficient if laid to be done by violence.”

Ibid., page 2457.

The terminology is archaic, but one gathers that in Blackstone's day as in the present day, robbers were charged with forceful and/or violent robberies without reference to the "putting in fear" aspect of the thing. In the language that immediately follows the last quotation, Blackstone states:

"And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed; it is enough that so much force, or threatening by word or gesture, be used as might create an apprehension of danger, or induce a man to part with his property without or against his consent . . . Or, if a person with a sword drawn begs an alms, and I give it to him through mistrust and apprehension of violence, this is a felonious robbery."

Ibid., page 2457.

Appellant has cited four cases on page 3 of his brief which purportedly hold that "actual personal violence" must be present in order to constitute "force" as used in the statute. None of these cases deal with the statute itself. They are furthermore easily distinguished.

Rivers v. State, 169 S. E. 260 (46 Ga. App. 778) dealt with three different statutes, one defining assault and battery, and two separate robbery statutes which are not set out in the opinion. It was obviously necessary to distinguish the statutory language as used in these particular statutes because the penalties in the various statutes differed considerably, depending upon the amount of force that was used.

State v. Sawyers, 29 S. E. 2d 34 (224 N. C. 61) is really authority for the Government's position in the instant appeal. In this case three sailors were unburdened of their money by five men who had driven the sailors down a dirt road at night and had overcome their resistance by verbally stating "This shakedown." The Court held this evidence sufficient to prove a common law robbery. The Court stated:

"Generally *the element of force in the offense of robbery may be actual or constructive*. Although actual force implies personal violence, the degree of force used is immaterial, so long as it is sufficient to compel the victim to part with his property . . . Under constructive force are included 'all demonstrations of force, menaces, and other means by which the person robbed is put in fear sufficient to suspend the free exercise of his will or prevent resistance to the taking.' No matter how slight the cause creating the fear may be or by what other circumstances the taking may be accomplished, if the transaction is attended with such circumstances of terror, such threatening by word or gesture, as in common experience are likely to create an apprehension of danger and induce a man to part with his property for the sake of his person, the victim is put in fear." (Emphasis added.)

The Court held that "upon an indictment for highway robbery at common law it is not necessary to prove both violence and putting in fear—*proof of either is sufficient*."

In *Cannon v. State*, 107 P. 2d 809 (71 Okl. Cr. 42), the case next cited by appellant, the Court distinguished robbery from larceny. Although the Court does say,

“The violence must be actual, personal violence,” it further goes on to say at page 810:

“But the degree of force used is immaterial, except under statutes which provide for a punishment varying with the violence which accompanies the taking. *If putting in fear is proved the offense is robbery.*” (Emphasis added).

Nelson v. State, 46 S. E. 2d 488 (233 Ga. 330), the last case cited by appellant, dealt with the unique situation in which the “robber” was himself acting under the duress of a co-prisoner during a prison break in which the sheriff was robbed. The defendant did not himself exercise any more force than was necessary to remove the sheriff’s wallet from his pocket. This was done under the instructions of the co-prisoner who had a gun. The Court made the distinction that this did not constitute actual violence and reversed the judgment on this and other grounds. The case is additionally distinguishable for the reason that it dealt with a statute charging “*open* force and violence” as distinguished from “force or intimidation,” and providing for the death penalty in the event open force and violence was used. Obviously, in this situation, the legislature intended something more than the common law definitions of the terms “force and violence.”

While no cases interpreting the words “force and violence” as distinguished from the word “intimidation” are found in the annotations following Section 2113 of Title 18, United States Code, it is apparent that Congress had in mind, at most, the common law definition of the terms. In view of the foregoing authorities it is respectfully submitted that the appellant in this case was properly charged with, and proven guilty of the offense in

question. For further authorities to the effect that the word "force" as a verb is equivalent to constraint or compulsion by moral or intellectual means as well as by actual physical violence.

See:

36 C. J. S. 1139;

77 C. J. S. 525;

43 Cal. Jur. 2d 94 (2d par.).

IV.

Irrespective of the Asserted Illegality of Appellant's Confession There Existed No Grounds to Review His Convictions Inasmuch as They Are Amply Supported by Other Evidence.

Appellant's somewhat novel contention that his confessions were improperly received in evidence because they were assertedly given after a period of detention that was entirely unrelated to the confessions themselves need not be passed upon by this Court. Even where an illegally obtained confession is erroneously sent to the jury together with other evidence in the case, the case presents no basis for review if the other evidence will itself sustain the verdict of guilty.

Stein v. New York, 346 U. S. 156, 190 (1953).

The record in this case, irrespective of the confessions, conclusively and irrefutably establishes the appellant's guilt. This Court consequently has no duty to inquire further concerning whether the confession was or was not legally obtained. Although it has been held that voluntary statements and confessions may not be admitted into evidence when obtained during an illegal detention, as where the defendant was detained an unreasonable

time before being brought before the Commissioner (*McNabb v. United States*, 318 U. S. 332), there is certainly no authority for appellant's contention that a voluntary confession should be excluded from evidence because of a *legal* detention which was unrelated to the taking of the confession except as a matter of pure coincidence.

V.

The Court Did Not Abuse Its Discretion in Imposing a Sentence of Forty Years in View of Appellant's Prior Record.

At the time of imposition of sentence the Court stated:

"We have to consider the public welfare in these things, as well as the welfare of the defendant. You have been pretty much at odds with the kind of conduct which the social order can prevent within its confines. You just can't have people engaging in constant criminality without doing something about it. I don't do it so much to punish you as to sort of in a way as we quarantine someone when they have smallpox." [T. R. 333.]

It is hornbook law that four theories must be present in the Court's mind every time sentence is imposed upon a defendant who has been convicted of an offense. The Court must consider: (1) Rehabilitation; if a human life can be salvaged it is always the duty of the Court to take such action at the time of sentencing as will appropriately insure the rehabilitation of a defendant; (2) Punishment; although this assertedly principal objective has been thrust into the background in recent years, it remains a very active consideration at the time of sentence (if only because punishment does sometimes reha-

bilitate); (3) Deterreny; a perhaps overworked theory; and finally (4) Protection of society; in the case of a hopeless offender society is entitled to as much protection as the Court can give at the time of sentencing.

Taking into account the previous record of this defendant and the efforts made at rehabilitation previously [T. R. 331], it should not be said as a matter of law that the Court abused its discretion in imposing the maximum possible sentence. It should be remembered furthermore that the entire probation report is not before the Court on appeal. Consequently, there is no way of knowing from the record what additional considerations may have influenced the Court in imposing the sentence that it did. If this were the first offense of this defendant a different picture would be presented.

Conclusion.

Appellant has raised the question of the variance supposedly existing between the charge and the evidence too late. The variance, if any, was cured by his failure to object and by the intervening verdict of guilty. A review of the entire history of the words used in the statute does not substantiate appellant's contention that a variance in fact exists inasmuch as the words of the statute have been used almost interchangeably throughout the history of their use. The evidence in the instant case establishes that "force and violence" as those terms are used in the statute was, in fact, exercised by appellant in the commission of the offense inasmuch as he made an unmistakable show of force while displaying an apparently dangerous weapon thereby overcoming the resistance of the two bank tellers. In any event, appellant was not prejudiced by the supposed variance inasmuch as he tried

the case on the same theory as did the Government. was not surprised by the evidence, and will suffer no double jeopardy by reason of the claimed variance; it is therefore immaterial under Rule 52 (a), Federal Rules of Criminal Procedure. The sentence imposed was manifestly within the Trial Court's discretion and should not be disturbed.

Respectfully submitted,

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No. 16,561 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

MARION JAMES LINDEN,

Appellant,

vs.

FRED R. DICKSON, Warden, California
State Prison, San Quentin,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California**

BRIEF FOR APPELLEE

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for the Northern District of California

BRIEF FOR APPELLEE

I.

STATEMENT OF THE CASE

Marion James Linden applied to the United States District Court for a writ of habeas corpus on August 5, 1959. He had been convicted in the Superior Court of the State of California in and for the County of Los Angeles of murder in the first degree. He had been sentenced to death and the execution was scheduled for August 7, 1959. His appeal had been heard by the California Supreme Court and the conviction and sentence affirmed, *People v. Linden*, 52 Adv. Cal. 1 (1959).

He applied to the United States Supreme Court for certiorari and, while that application has not been acted upon, an accompanying request for stay of execution was denied.

In his petition for habeas corpus Linden alleged that at the time of trial he was incompetent by reason of insanity to waive counsel, that the trial court erred as a matter of law in permitting him to waive counsel and at his request defend himself, and that consequently petitioner was deprived of his liberty without due process of law as required by the Fourteenth Amendment to the United States Constitution. A letter to counsel for the applicant from Dr. Bernard Diamond is attached to the petition, but the letter was not incorporated by reference into the petition, nor was it offered or received in evidence before the district judge.

On August 5, 1959, the district court denied the application for habeas corpus on the ground that the question of petitioner's mental competence to waive counsel was purely a factual one which was considered and determined by the trial court, and that no federal question was presented (Order Granting Leave to File Application in Forma Pauperis and Denying Application). The district court did not issue an order to show cause, and no evidence was offered or received. The district court did not have before it the record of the state trial. The district court did consider the opinion of the Supreme Court of California affirming Linden's conviction and considering in detail the issue of competence to waive counsel.

Thereafter the district court declined to issue a certificate of probable cause for appeal. However, Circuit Judge Frederick G. Hamley did issue a certificate of probable cause, and the appeal from the order denying the application for a writ is now before this court.

The applicant makes two contentions on appeal:

(1) he contends that the district court erred in denying the application without holding a hearing or examining the state trial record, and

(2) he contends that, assuming the district court did not have to examine the state record, that court erred in denying the application on the basis of the facts appearing in the application and the opinion of the California Supreme Court.

The appellee contends, first, that from a procedural standpoint it is within the discretion of the district court to deny an application for habeas corpus by a state prisoner without holding a hearing or examining the complete state record when the state court opinion considers the same issue raised in the application and when the facts stated in the state court opinion are not controverted or supplemented by the applicant; and, second, on the merits, it is apparent that the applicant was not denied due process of law in the state court proceedings.

II.

ARGUMENT**A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE APPLICATION FOR A WRIT OF HABEAS CORPUS WITHOUT HOLDING A HEARING OR REVIEWING THE COMPLETE STATE COURT RECORD**

The applicant claims that the district court erred in denying the application on the basis of the papers before it and that the court was compelled to conduct further proceedings, either to hold a formal hearing or review the complete record of the state court proceedings. By record, we assume appellant means the reporter's and clerk's transcripts of the trial. The appellee submits that the district court is free to exercise its discretion in regard to the procedural mechanics of handling applications for habeas corpus by state prisoners and, depending on the issues raised and facts alleged in the application, may review whatever portion of the state record which satisfies the court that the applicant has not been denied his constitutional rights. In the case at bar, after examining the opinion of the California Supreme Court in light of the allegations in the application, the district court needed to proceed no further to satisfy itself that the application was without merit.

1. The application does not state facts which entitle the applicant to a writ of habeas corpus

The application filed by Linden is very brief in its charging allegations. It is admitted that petitioner was furnished with counsel by the trial court. It is admitted that petitioner requested that appointed

counsel be removed and that he be allowed to conduct his own defense. The state trial court granted the request and petitioner did conduct his own defense. It is then alleged that "at the time of the trial he was, by reason of insanity, incompetent to waive counsel; that the trial court erred as a matter of law in permitting him to waive counsel and at his request permit him to represent himself; and that consequently petitioner was deprived of his liberty without due process of law . . ." (Application, 2:11-15). Attached to the application was a letter written to the attorney for the petitioner by Dr. Bernard Diamond, but the contents of the letter were not incorporated into the petition by reference nor was the letter offered into evidence before the district court.

It is fundamental that, as in all litigation, a prima facie case must be stated in an application for a writ of habeas corpus, *Brown v. Allen*, 344 U.S. 443, 502 (1952). The application must meet the test of alleging facts that entitle the applicant to relief (*Id.* at 461).

The application in the case at bar does not set forth facts which support the pleader's conclusion that the applicant was incompetent to waive counsel at the time in question. The mere allegation of incompetency is wholly a conclusion and may be disregarded, *United States ex rel. Holly v. Pennsylvania*, 81 F. Supp. 861, 871 (W.D. Pa. 1948), aff'd 174 F.2d 480 (3d Cir. 1949); see also *Collins v. McDonald*, 258 U.S. 416, 420 (1921); *Kohl v. Lehlback*, 160 U.S. 293, 296, 299 (1895); *Cuddy, Petitioner*, 131 U.S. 280, 286 (1888); *Hodge v. Huff*, 140 F.2d 686, 688 (D.C. Cir. 1944);

Osborne v. Johnston, 120 F.2d 947, 948 (9th Cir. 1941). By failing to set forth frankly and candidly the facts supporting his claim of a denial of due process, the applicant failed to state a *prima facie* case, *Dorsey v. Gill*, 148 F.2d 857, 868-869 (D.C. Cir. 1945); see, *Ex parte Hull*, 312 U.S. 546, 550-551 (1940).

In a habeas corpus proceeding by a federal prisoner where there was a claim of lack of competency to waive counsel, an application was denied in part due to the failure of the applicant to allege that the insanity was of such a character that it rendered him incapable of knowing of his right to counsel and of competently waiving it, even though the petitioner alleged a commitment for insanity prior to the federal trial. *Ex parte Hall*, 31 F. Supp. 673 (N.D. Cal. 1940). The application in the case at bar is obviously far more defective than the *Hall* application. There are no allegations of commitment, diagnosis, or conduct which would justify the conclusion that the applicant was in fact incompetent at the time of trial to waive counsel.

It is sometimes said that in a habeas corpus proceeding the petition need not be artfully drafted, since the majority of such petitions are filed by state and federal prisoners personally and without the assistance of counsel. However, the instant application was filed by an attorney on behalf of the state prisoner and the quality of Appellant's Opening Brief bears witness to the competency of his attorney. It seems likely that the omission from the application of specific factual allegations results from the nonexistence of any such facts.

2. However, the district court also examined the opinion of the California Supreme Court discussing and rejecting applicant's claim and, in light of the application and state court opinion, the district court did not abuse its discretion in denying the application without further proceedings

The district court did not limit itself to the application but also reviewed the opinion of the California Supreme Court. *People v. Linden*, 52 Adv. Cal. 1 (1959). In that opinion the state supreme court fully discussed the constitutional claim presented in the application. The facts as recited in that opinion will be discussed in detail with respect to the merits of the applicant's claim but may be briefly summarized at this point. Linden, who had two prior felony convictions and who, according to his own admissions, had previously been tried for murder, was furnished counsel at the outset of the trial. After five days of trial Linden became dissatisfied with his attorney and requested that an "advisory counsel" be appointed. The trial court declined to appoint an advisory counsel and declined to substitute another attorney at that stage of the proceedings. Finally, the trial court relieved counsel of record for Linden but permitted him to remain in an advisory capacity while Linden conducted his own defense. By this time the People had rested and the conduct of the trial thereafter was limited to final argument by Linden since no evidence for the defense was presented.

Upon the basis of this record the district court concluded that the issue of Linden's mental capacity to waive counsel was a factual issue for the trial court which was considered and determined by that court and that no federal question was presented.

Now the appellant complains that the district court, after reviewing the application and the state court opinion, had no discretion to rule on the application but should have either held a hearing or ordered that the entire record of the state trial be produced and reviewed. Appellant states the bold proposition that the district court must, in ruling on an application of this nature, hold a hearing or examine the entire state trial record.

For this proposition appellant rests initially on the following language from *Brown v. Allen*:

“Applications to district courts upon grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more if the court is satisfied, by the record, that the state process has given fair consideration to the issues and offered evidence, and has resulted in a satisfactory conclusion . . .

“It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice.” *Brown v. Allen*, 344 U.S. at 463, quoted in Appellant’s Opening Brief, 5:17-23.

This language appears in part III of Justice Reed’s opinion which is entitled “Right To Plenary Hearing.” That portion of the opinion considered the claim of one of the applicants that the district court erred in refusing a writ on the basis of an examination of the record in the federal and state courts instead of holding a plenary trial of the federal constitutional issues. *Brown v. Allen*, 344 U.S. at 460. The opinion was only

concerned with the question of whether the district court could deny the writ after reviewing the state record or whether it had to retry the issues. The complete state trial record had been received by the district court (*Ibid.*). The holding was simply that the district court was not required, as a matter of law, to hold a hearing.

It is a distortion of this language to take it literally for the proposition that a district court must, in the case of every application for habeas corpus, either review the complete state record or hold a hearing. Since the district court had in fact reviewed the complete state record the issue was only whether this procedure was adequate, not whether it was mandatory.

Justice Frankfurter, in his opinion which may be considered jointly with Reed's opinion on this point (*Id.* at 497), makes it clear that an application may and should be dismissed when it fails to state a good cause for relief (*Id.* at 502). The opinion goes on to discuss various procedural possibilities, emphasizing the necessity of "flexibility" (*Id.* at 503), and noting that it seems "unduly rigid to call for the state record in every case" (*Id.* at 504). However, Justice Frankfurter's opinion is addressed to the same question as Reed's, namely, whether the district court could deny an application after examining the state record without holding a hearing, and neither of the opinions was concerned with the propriety of denying an application in the absence of the state record or, more importantly, what the "record" must consist of.

In *United States ex rel. DeVita v. McCorkle*, 216 F.2d 743 (3d Cir. 1954), the Court of Appeals for the Third Circuit purported to define the "record" which is alluded to in *Brown v. Allen*. A state prisoner under a death sentence applied for a writ of habeas corpus the day before the time and place of execution were to be announced (*Id.* at 744). The district judge apparently felt that he had to dispose of the case immediately and after examining the application and the opinion of the New Jersey Supreme Court affirming the applicant's conviction, he denied the application. The court of appeals reversed, indicating that the district judge should have reviewed the "original state record" or ordered that a hearing be held (*Id.* at 747).

While this decision bears a superficial similarity to the case at bar, there are several distinguishing characteristics. First, the court of appeals concluded that the district judge "felt himself so circumscribed by the time element" that he limited his review of the state court record to the opinion of the state supreme court (*Id.* at 747). The court of appeals seemed to feel that the district judge wanted to read the entire record but did not do so because of press of time. Second, the district judge, after denying the application, issued a certificate of probable cause for appeal. Finally, the application alleged in detail the facts pertaining to the alleged denial of a constitutional right, see opinion on remand, *United States ex rel. DeVita v. McCorkle*, 133 F. Supp. 169, 172, fn. 18 (N.J.D. 1955).

In the case at bar none of these factors were present. The district judge was not, apparently, in any

hurry to decide this case. He did not base his decision on the state court opinion because of insufficient time to examine the trial record but rather because he was satisfied from the state court opinion that the application was without merit. The district judge also denied a certificate of probable cause. Moreover, the application is entirely devoid of specific factual allegations.

We must assume that the requirement of reviewing a state court record, when applicable, is not entirely a mechanical and artificial rule. Presumably, an examination of the record is required to accomplish some worthwhile purpose. It is not simply a ritual to be carried out by the district judge.

In the case at bar the opinion of the state supreme court contains a complete and thorough discussion of the alleged deprivation of constitutional rights upon which the application for a writ of habeas corpus is based. The application itself sets forth no factual allegations; it merely contains the conclusion that the petitioner was "by reason of insanity incompetent" to waive counsel. The application does not controvert any of the facts recited in the state supreme court opinion, nor does the application allege any facts in addition to those recited in the state supreme court opinion.

Moreover, the applicant was supplied the complete record of his trial, pursuant to California law¹ and yet

¹In any case in which the penalty of death is imposed an appeal is automatically taken to the California Supreme Court (Cal. Pen. Code §1239) and the entire record of the trial is supplied to the defendant without cost (Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, Rule 33(c), p. 29).

he failed to incorporate any pertinent portions of that record into his application or refer to any facts appearing therein which might controvert or supplement the opinion of the state supreme court. Whether or not an applicant should be required to incorporate in his application the portions of a state record available to him upon which he bases his claim of denial of a constitutional right,² it is entirely unreasonable to compel a district judge to indulge in the mechanical routine of examining a voluminous transcript when the state supreme court has adequately discussed the constitutional claim and the applicant, who has the complete trial record in his possession, has failed to controvert or supplement the facts recited in the state court opinion or incorporate or summarize facts appearing in the trial record which would support his claim of denial of a constitutional right.

The procedural mechanics of handling applications for habeas corpus in the federal courts by state prisoners have not been defined with rigidity. The habeas corpus statute simply declares that "the court shall summarily hear and determine the facts, and dispose of the matter as law and justice require" (28 U.S.C. § 2243). The supreme court has declared that a dis-

²It has been stated that a petition in habeas corpus must, as part of stating a prima facie case, state by what authority the prisoner is detained, and if that authority is a warrant of commitment then he must attach or set out a copy of the warrant together with a copy of the "transcript of the record (or its essential parts) in the proceeding which resulted in the commitment," unless the applicant is unable to do so, *Dorsey v. Gill*, 148 F.2d 857, 868 (D.C. Cir. 1945). See also *Ex parte Hull*, 312 U. S. 546 (1940), where the Supreme Court indicated it would be improper to inquire into procedural due process when the applicant had not furnished the transcript of the trial proceedings.

trict court shall not give any weight to a denial of certiorari, *Brown v. Allen*, 344 U.S. 443 (1953), and has forbidden the determination of factual issues by affidavit, *Walker v. Johnston*, 312 U.S. 275 (1940). On the other hand, the court has approved the use of the order to show cause, *Walker v. Johnston*, *supra*, at 284, and has recognized the need for "flexibility" in habeas corpus proceedings, *Brown v. Allen*, *supra*, at 503, and deprecated "unduly rigid" procedural rules, *id.* at 504. None of the cases cited by appellant compel the examination of the complete trial record under the circumstances of the case at bar. As we have indicated above, *Brown v. Allen* was not concerned with the problem since the complete record had been reviewed by the district courts. *United States ex rel. DeVita v. McCorkle*, 216 F.2d 743 (3d Cir. 1954), involved a factual background in the district court not present in the case at bar. *Burwell v. Teets*, 245 F.2d 154 (9th Cir. 1957), simply indicates that the district court may call for the record, a proposition which we do not dispute. *United States ex rel. Rogers v. Richmond*, 252 F.2d 807 (2d Cir.) *cert. den.* 357 U.S. 220 (1958), held that it was improper for a district judge to hold a hearing *de novo* with respect to factual issues determined by the state courts without examining the state record and finding a "vital flaw" or "unusual circumstances" justifying a complete new trial (252 F.2d at 811). This decision presents the converse of the situation present here. The district judge in *Rogers* held a hearing without according any respect to the state court's determinations. Here the district judge has, in the absence of allegations controverting or

supplementing the facts stated in the opinion of the state supreme court, relied on a portion of the state record which is adequate under the facts and circumstances of this case.

Since no decisions of the U. S Supreme Court compel the result sought by the appellant, this court is free to exercise its own judgment in fashioning workable and realistic procedural rules. There are at least two fundamental difficulties with the procedural strait jacket in which appellant would confine federal district judges. The first is mechanical. What is the "record"? Under California law when a defendant takes an appeal from a judgment of conviction the record normally consists of a clerk's transcript containing certain specified portions of the proceedings and a reporter's transcript of oral proceedings with certain exclusions.³ The transcripts may be supplemented on request of the defendant.⁴ Where a death

³The normal record on appeal consists of the following:

"(1) A clerk's transcript, containing copies of (a) the notice of appeal, and any request for additional record and any order made pursuant thereto; (b) the indictment, information or accusation; (c) any demurrer; (d) any motion for a new trial; (e) all minutes of the court relating to the action; (f) the verdict; (g) the judgment or order appealed from; and

"(2) A reporter's transcript of the oral proceedings taken on the trial of the cause and on the hearing of the motion for a new trial, excluding therefrom proceedings on the *voir dire* examination of jurors, oral or written instructions given or refused, opening statements, and arguments to the jury." (Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, Rule 33(a), p. 28).

⁴The appellant may request the inclusion of the following:

"(1) In the clerk's transcript: (a) Written motions made or notices of motion given by the defendant or by the People, and affidavits filed in support of or in opposition to the motion

penalty has been imposed, the entire record of the action is prepared (Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, 33(c), p. 29). Ordinarily in death penalty cases this record is extremely voluminous and in any particular case contains a good deal of matter which is wholly irrelevant to the particular claim of the applicant for habeas corpus. It is doubtful that a district judge must review and digest each and every page of these transcripts on his own motion. At least when this complete record is available to the applicant and he fails to incorporate or refer to any portion thereof in his application, it seems an undue burden to require a district judge to plow through these transcripts on the supposition that somewhere something may be found which will justify the claim of denial of a constitutional right. Certainly the proceedings on appeal from the conviction are also a portion of the state record, and where the opinion of the state su-

for new trial or any other motion; (b) written instructions given or refused, provided, however, that if error is urged as to the giving, refusal or modification of instructions, the clerk's transcript shall include all written instructions given, and shall show at whose request they were given; (c) any written opinion of the superior court.

"(2) In the reporter's transcript: (a) Proceedings on the *voir dire* examination of jurors; (b) opening statements; (c) arguments to the jury; (d) any oral opinion of the superior court, and comments on the evidence by the trial judge before the jury; (e) instructions given, which cannot be copied by the clerk; provided, however, that if error is urged as to the giving, refusal or modification of instructions, the reporter's transcript shall include all instructions given which cannot be copied by the clerk.

"(3) To be transmitted as originals: Any exhibits admitted in evidence or rejected." (Rules on Appeal for the Supreme Court and District Courts of Appeal of the State of California, Rule 33(b), pp. 28-29).

preme court adequately deals with the claim of the applicant, a district judge should be able to rely on that opinion, in the absence of appropriate allegations in the application.

Secondly, any requirement that a district court review the trial record under the circumstances of the case at bar reflects an unjustified attitude of suspicion and distrust of state courts. To a certain extent this attitude appears in *United States ex rel. DeVita v. McCorkle, supra*, where the Court of Appeals for the Third Circuit indicated that a district court cannot rely on a state court opinion as the record even though that opinion discusses the evidence and draws factual and legal conclusions therefrom (216 F.2d at 746). The court noted certain conclusions of the state supreme court to the effect that a certain point found no support in the record and that a "fair inference" could be drawn from certain conduct. Then the court of appeals made the following observation:

"Without looking at the state record it would be impossible for the district judge to know whether this point did find any other support in the record and whether the state supreme court's conclusion was 'a fair inference.' " (216 F.2d, at 747, fn. 9.)

If this language indicates that the federal courts cannot rely on the truthfulness and verity of a state court opinion, even in the absence of controverting allegations by the applicant, then we submit that the Third Circuit misconceives the proper role of habeas corpus. The federal courts do not sit as another ave-

nue of appeal for convicted felons. They sit for the purpose of insuring respect for federal constitutional rights. In doing so federal judges should at least be permitted to respect state determinations in the absence of specific allegations controverting or supplementing the recitals of fact and conclusions of the highest court of a state.

In conclusion, then, we submit that the district judge was entitled in his discretion to review only the state supreme court opinion in the case at bar and was not required to order the production of the complete state trial record, when (1) the state supreme court discussed the constitutional claim fully and recited in detail the facts surrounding the claim; (2) the application stated only a bare conclusion; (3) none of the historical facts stated in the state court opinion are controverted specifically in the application; (4) no facts in addition to those recited in the state court opinion are alleged in the application; (5) no reference is made in the application to the trial record nor is any portion thereof attached and incorporated in the application; and (6) the record was available to the applicant and had been available to him for his appeal to the state supreme court.

We may turn now to the question of whether the state court opinion adequately disposes of the contention of the applicant, namely, that he was not competent to waive counsel and that his lack of competency resulted in a denial of due process.

B. THE DISTRICT COURT DID NOT ERR IN DENYING THE APPLICATION FOR A WRIT OF HABEAS CORPUS ON THE MERITS

Linden was charged with murder in the state court. The People's evidence indicated that Linden became involved in a fight in a Los Angeles bar. He was removed by a police officer who took him outside, searched him for weapons, found none, and told him to go home. Later that night the officer again encountered Linden outside the bar, searched him and went to a nearby police call box. Linden then stepped to the officer's side, shot him twice and ran away. The officer fired at Linden, who returned the fire. Later the officer died from the wounds inflicted by Linden. *People v. Linden*, 52 Adv. Cal. 1, 11 (1959).

Recognizing the defendant's right to counsel, the California trial court appointed an attorney to defend Linden after he refused to accept the services of the public defender. The attorney represented him until the fifth day of the trial when Linden interrupted the proceedings, claiming that the attorney was not handling the case in the way in which Linden desired. The trial court reserved ruling on the questions of relieving the attorney and further representation of the defendant until the People concluded its case. A little more evidence was presented and the People rested. The trial court then instructed the defendant "fully and correctly" concerning his right to counsel, the lack of special privileges to a defendant who insists on representing himself, and the absence of any right to an advisory counsel in the capacity of errand boy. The trial court then relieved defendant's counsel

as attorney of record, and, with his consent, appointed him as legal advisor for the remainder of the trial. There was then considerable discussion as to the production of defense evidence. The district attorney produced all the evidence that Linden demanded and his advisory counsel prepared a subpoena for the production of certain witnesses. However, after a recess the trial court asked Linden if he wished to call his witnesses and the defendant rested. Apparently Linden presented his own argument to the jury. The jury returned a verdict of guilty with a recommendation that the death penalty be imposed (*Id.* at 14-15).

The Supreme Court of California has recognized that under the Fourteenth Amendment to the United States Constitution and under California law there must be an intelligent and understanding waiver of counsel in capital cases. The California courts have scrutinized carefully the proceedings surrounding a waiver of counsel and have not hesitated to find that a waiver was not valid under appropriate facts and circumstances. *In re James*, 38 Cal.2d 302, 240 P.2d 596 (1952); *People v. Chesser*, 29 Cal.2d 815, 178 P.2d 761 (1947). On the other hand, counsel cannot be forced upon a defendant. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). Whether there has been an intelligent waiver depends on the particular facts and circumstances surrounding the case and should be determined by the trial court. *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938).

The Supreme Court of California carefully considered the applicant's claim of lack of competence to

waive counsel on his appeal from the conviction. *People v. Linden*, 52 Adv. Cal. 1, 14-17. In rejecting this claim the court noted his "untenable but not naive argument" that his state constitutional (Cal.Const. Art. I, §13) and statutory (Cal. Pen.Code, §686) right to "appear and defend in person and with counsel" was "conjunctive" in character and entitled him to conduct his case personally and to be furnished counsel as well. The court noted his "alertness" to protect his rights in connection with ascertaining the adequacy of the indictment, and that, as a matter of fact, while he was not entitled to it, the defendant had the advisory services of counsel throughout the trial. The defendant was given every opportunity, with the assistance of the district attorney and his own advisory counsel, to obtain evidence in his defense. The trial court conducted lengthy discussions with Linden and had ample opportunity to observe his abilities and disabilities and did not deem him incompetent to waive counsel and proceed with his own case. The Supreme Court of California concluded that the defendant was fully aware of the situation when he insisted upon representing himself and, while he was not a trained attorney, the trial court committed no abuse of discretion in permitting him to waive counsel (*Id.* at 16-17).

In his application for habeas corpus Linden claims that he was not competent to waive counsel by reason of insanity. At this juncture in a collateral attack on his conviction Linden has the burden of showing by a preponderance of the evidence that he did not, in

fact, intelligently and understandably waive his right to counsel. *Moore v. Michigan*, 355 U.S. 155, 161-162 (1956). In his opening brief counsel for appellant styles Linden as "ignorant, unskilled, uneducated and *probably* mentally incompetent" (App. Op. Br. 8:16-17; emphasis added). No facts are alleged in the verified application in support of any of these supposed characteristics of Linden. Probably he was "unskilled" in the sense of lacking the training and experience of a practicing lawyer. However, so long as counsel cannot be forced on a person, this fact cannot alone constitute a constitutional infirmity. From the standpoint of long experience in criminal proceedings, the defendant had the benefit of two prior felony convictions, one for voluntary manslaughter, *People v. Linden*, 52 Adv. Cal. 1, 19. After his arrest the defendant claimed that he had "beaten one other murder rap." He stated that "he was going to be very hard to convict on this charge" (*Id.* at 12). There are probably few laymen with an equivalent background in criminal proceedings.

With specific reference to his claim of insanity, the applicant has failed to allege any facts which would support his claim. He has alleged no facts indicating any prior commitment to a mental institution or any treatment or diagnosis of mental illness whatever, nor are any facts alleged in the application with respect to his conduct which would support this conclusion. It is suggested in the opening brief that he was, at the time of trial, "probably mentally incompetent" and "probably mentally disturbed" (App.

Op. Br. 8:16-17, 10:12-13). He is said to be a "strong-willed, insistent individual," devoid of "emotional soundness." (App. Op. Br. 9:2-3, 10:25-26.) Apparently Linden is an arrogant and abusive person. He hated the police, deemed himself "tough to beat" in court, and was given to vicious obscenity (*People v. Linden, supra*, at 13). He was dissatisfied with his trial attorney when the latter did not follow his instructions (*Id.* at 14), and claimed that his attorneys on appeal had been "planted" by the district attorney and had "doublecrossed" him (*Id.* at 33). We must concede that this conduct indicates a disagreeable and antisocial personality which is consistent with the vicious and savage murder of a Los Angeles policeman for which he was convicted. However, these personal characteristics certainly do not bear out any claim of a lack of competency in the sense of a lack of mental ability to understand the charges and the proceedings. Unless a disagreeable personality is synonymous with lack of competence the applicant has failed to make out any sort of a case.

The only evidence related in any way to insanity consists of a letter written by Dr. Bernard Diamond on July 31, 1959 and attached to the application. This letter was never incorporated by reference into the application, was not verified, and was never offered or received in evidence. While the letter is not properly before this court as part of the record on appeal, it is interesting to note the basic inconsistency appearing in Dr. Diamond's random comments based on the review of certain unidentified "letters and legal docu-

ments''. The doctor is of the view that the trial court could not be "blamed for regarding him [Linden] as normal." Yet the doctor also opines that the issue of the defendant's competence should have been raised at the trial. He does not say who should have raised this issue, since he admits that Linden's conduct was not sufficient to alert the trial court to regard him as anything other than normal. Unless the Constitution of the United States demands a full hearing on the question of mental competence whenever there is an attempted waiver of counsel, even though the trial court is entirely justified from the defendant's conduct in concluding that he has sufficient mental ability to proceed in his own defense, then Dr. Diamond's letter adds nothing to this case even if accepted at face value.

This is not the case of a young boy, inexperienced in judicial proceedings, who waives counsel under pressure from law enforcement authorities or motivated by fear of mob violence. See, for example, *Moore v. Michigan*, 355 U.S. 155 (1957). Instead, it involves a confirmed criminal with two prior felony convictions who accepted the services of court-appointed counsel throughout the primary portion of the people's case.⁵ He then claimed the right to conduct his own defense and in addition have available to him the services of an advisory counsel. While the trial court denied his right to advisory counsel, as a practical matter the court-appointed counsel, after being relieved as attor-

⁵When Linden requested that his court-appointed attorney be relieved, he admitted that counsel "has been very fair with me and he has been a very good attorney," to which the trial judge responded, "Yes, he has." *People v. Linden*, 52 Adv. Cal. at 14, fn. 2.

ney of record, remained throughout the proceedings as an advisor. The defendant demonstrated alertness as to his legal rights, and the trial court accepted his waiver of counsel only after fully instructing him with respect to his rights and the responsibilities which he would assume if he waived counsel. Still the defendant persisted in his waiver, which was finally accepted. There is nothing in the opinion of the state supreme court which establishes any alleged lack of competence of the defendant to waive counsel. The application adds nothing of a factual character. From the record before this court, there is nothing to indicate that the applicant at the time of trial manifested his incompetence to waive counsel so that the trial judge, by ignoring his lack of competence and accepting the waiver, deprived the applicant of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

III.

CONCLUSION

The district court denied an application for a writ of habeas corpus by a state prisoner in the case at bar. While the application alleged merely the conclusion that the applicant was incompetent by reason of insanity to waive counsel and failed to state a *prima facie* case, the district judge examined the opinion of the California Supreme Court affirming the conviction and death sentence of the applicant. The state supreme court opinion gave full consideration to the alleged

denial of a constitutional right invoked in the application and recited in detail the factual proceedings at the trial. Since the application did not controvert or supplement the facts stated in the state supreme court opinion and since the application did not incorporate or refer to any portion of the trial record in support of the grounds stated in the application, it was not necessary for the district court to conduct any further proceedings, either by holding a hearing or reviewing the state trial record. The state court opinion and the application do not sustain the applicant's burden of establishing that he did not, in fact, intelligently and understandably waive counsel. Therefore, the order of the district court denying the application for a writ of habeas corpus should be affirmed.

Dated, San Francisco, California,
October 14, 1959.

Respectfully submitted,

STANLEY MOSK,

Attorney General of the State of California,

ALBERT W. HARRIS, JR.,

Deputy Attorney General of the State of California,

Attorneys for Appellee.

No. 16565 ✓

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

GREAT FALLS EMPLOYERS' COUNCIL,
INC., et al., Respondents.

Transcript of Record

Petition for Enforcement of an Order of the
National Labor Relations Board

FILED

NOV 10 1959

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-1459

GREAT FALLS EMPLOYERS' COUNCIL,
INC., RETAIL FOOD DEALERS DIVI-
SION, AND ITS MEMBER EMPLOYERS,
BUTTREY FOODS, INC., SAFEWAY
STORES, INC., Paul A. Matteucci, d/b/a
MATTEUCCI'S SUPER SAVE MARKET,
Paul A. Matteucci, d/b/a SOUTHGATE
SUPER SAVE MARKET, John Eustance,
d/b/a WHITE HOUSE GROCERY, Robert
Noble and John H. Noble, d/b/a NOBLE
MERCANTILE COMPANY, E. R. Fjelstad,
d/b/a AL'S FOOD MARKET, Wallace An-
derson, d/b/a WALLY'S SUPERETTE,

and

RETAIL CLERKS INTERNATIONAL ASSO-
CIATION, LOCAL No. 57, AFL-CIO.

COMPLAINT

It having been charged by Retail Clerks Interna-
tional Association, Local No. 57, AFL-CIO, that
Great Falls Employers' Council, Inc., Retail Food
Dealers Division, and its member-employers, But-

trey Foods, Inc., Safeway Stores, Inc., Matteucci's Super Save Market, Southgate Super Save Market, White House Grocery, Noble Mercantile Company, Al's Food Market, and Wally's Superette have engaged in and are now engaging in certain unfair labor practices affecting commerce, as set forth in the Labor Management Relations Act of 1947, 61 Stat. 136, (herein called the Act), the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Great Falls Employers' Council, Inc., Retail Food Dealers Division, hereinafter referred to as Division, is and has been an Association of member-employers engaged in the retail sale of foods in Great Falls, Montana, and is and has been the agent of its member-employers in representing them in collective bargaining and adjustment of grievances with labor organizations. The gross annual retail sales of its member-employers exceeds \$10,000,000 and their gross annual purchase of merchandise delivered to them from sources outside the State of Montana exceed \$1,000,000 for goods shipped directly to them and exceed \$2,000,000 for goods previously shipped in from out of state but sold and delivered to them from local warehouses.

II.

The Division has as its member-employers the following firms, hereinafter referred to by their trade names, whose ownership is shown as follows:

- (1) Buttrey Foods, Inc., a corporation.
- (2) Safeway Stores, Inc., a corporation.
- (3) Matteucci's Super Save Market, owned by Paul A. Matteucci.
- (4) Southgate Super Save Market, owned by Paul A. Matteucci.
- (5) White House Grocery, owned by John Eustance.
- (6) Noble Mercantile Company, owned by Robert Noble and John H. Noble.
- (7) Al's Food Market, owned by E. R. Fjelstad.
- (8) Wally's Superette, owned by Wallace Anderson.

III.

The Division and the member-employers, hereinafter referred to collectively as Respondents, are engaged in business which is in commerce and affect commerce within the meaning of Section 2 (6) and (7) of the Act.

IV.

International Retail Clerks Association, Local No. 57, AFL-CIO, hereinafter called Union, is organized for the purpose, in part, of representing employees in the employ of Respondents in collective bargaining with Respondents, respecting wages, hours, and working conditions, and has its principal

office in Great Falls, Montana, and is a labor organization within the meaning of Section 2 (5) of the Act.

V.

The following unit of employees is appropriate for collective bargaining and has been the unit with respect to which there has been bargaining between the Division and the Union since 1954:

All sales clerks, checkers, grocery or produce clerks, receiving or shipping clerks, stock clerks, order clerks, light parcel delivery men, jumpers, box boys, sackers and wrappers of employers in the Retail Food Dealers Division of the Great Falls Employers' Council, excluding supervisory employees as defined in the Act.

VI.

The Union at all times material has been and is the bargaining representative chosen by a majority of the employees in the unit described above.

VII.

The Division and the Union from January to April, 1957, were bargaining collectively to modify and amend some terms in their 1955-1957 agreement, to be effective April 1, 1957.

VIII.

The collective bargaining of the Division and the Union continued until April 12, 1957, at which time the Union and the Division had rejected the offers of one another.

IX.

On April 13, the Union instituted strike action to induce acceptance of its last proposal, by them withdrawing the employees and picketing the three stores of one member-employer, namely, Buttrey Foods, Inc. Prompted by this picketing of this member-employer, and to preserve the unity of their position, the remaining member-employers of the Division acting in concert and pursuant to instructions of their Division, suspended from employment and sent home, thereby locking out, all their employees in the unit represented by the Union. Additionally, the Respondent's withdrew all proposals for a collective bargaining agreement and announced there would be no further observance of any terms or conditions which existed under the acceptable provisions of the prior agreement, except only the wage rates being paid and the accruing vacation rights.

X.

The locked out employees of the member-employers on the next business day applied to the Montana Unemployment Compensation Commission for benefits due to their lack of employment, and did so pursuant to instructions given them by their Union. The Respondents forthwith protested to said Commission against any payment of benefits to the locked out employees. Additionally, to defeat all claims, the Respondents elected to make the lockout intermittent by providing work to each locked out employee sufficient to pay to each a wage in an

amount that would disqualify that employee from receiving benefits as unemployment compensation which if paid would approximate double that amount.

XI.

The locked out employees, being those of all member-employers except Buttrey Foods, Inc., listed under the names of their respective employers, were the following:

Safeway #1855—Central Ave.

Fate Brewer, Jr.	Ben Peterson
Glen Bridgeford	Helen Pittman
Richard Konesky	Billy B. Young
Leonard Moyer	

Safeway #1856—North

Arlene Bauer	Jack McConnel
Margaret Clausen	Neil J. McRorie
Deloris Daniels	Stanley A. Marko
Robert A. Dull	Patrick Lyons
Jean Hallan	Aaron Peterson
Richard L. Hamers	David S. Scott
Lydell Jurasek	John Scott
Keith E. Keller	Grace Simonton
Phil A. Keller	Joseph Super
Cecelia Krall	Lionel Swenson, Jr.
June M. Leiby	Alice Lorraine Tenney

Noble Mercantile

William Gosney	Alta Kopetski
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Safeway #1857—West Side

Rose Marie Andrews	Arthur L. Raunig, Jr.
Marion R. Crawford	Dorothy K. Rio
Herbert F. Hart	Freedra Rosbarsky
Patrick O'Connell	Donna J. Sanders
Peder G. Pederson	Frank Searl
Joyce Ann Perrigo	Margaret Tempel
William Puzon	Leah Walbon

Safeway #1865—South East

Louise Armstrong	Irmen L. D. Knerr
Helen M. Axtman	Nettie Korin
Verna Brown	Alvin Ladd
Charles Bundi	Peter K. Meras
Charlotte Golberg	Dan Meyer
Jack Itami	Joseph Meyer
Frances E. Kelly	Paul Pfeifle

Al's Food Market

Lucille Sowa	Clarice Klundt
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Super Save Market

Verlyn Brown	Barbara Koesler
Joseph Chambers	Doris Madison
Lorrin A. Darby	Irene I. Major
Gayle Garrity	Thomas S. Marshall
Richard Gasvoda	Jerry Mitchell
Charlene Gleason	Doris Paulson
Everett W. Greenbush	Donn Peterson
Patsy A. Holmes	George F. Potts
Arlee Javner	Robert E. Purcell
Gertrude Kendall	Elmer Riley

Super Save Market—(Continued)

Dewain D. Ryan	Leonard J. Weaving
Darell D. Schwen	Stuart Wilson
Daryl A. Soltesz	

South Gate Super Save Market

Madlee Anderson	Robert C. Gill
Helen M. Burns	Ken Roeben, Jr.
Helen P. Gabbert	Wilford G. Smith
Lucille Habel	Stanley L. Timms
Tony Kraft	Helen Wheeler

White House Grocery

Joett E. Aman	Laurence Love
Rose Cadieux	Georgia Vining
Harry Kimmerle	

Wally's Superette

Lester Oswald

XII.

The listed employees were called to work in the work weeks following April 13, on April 19 and 20 and on April 26 and 27, until settlement of the strike on the latter date, pursuant to the planned intermittent lockout, except for the employees of Al's Food Market and Wally's Superette who were given continuing employment when recalled on April 19.

XIII.

The action of the Respondents described above was taken in executing their concerted efforts to

induce the Union and its members to abandon their strike and to dissuade the members from further participation in concerted action for their mutual aid and protection.

XIV.

The action of the Respondents described above, relating to the acceptable terms and conditions of employment not then subject to negotiation, was taken unilaterally when Respondents were obliged to negotiate on all changes in terms and conditions with the Union, and Respondents' action in withdrawing all proposals on terms under negotiation was taken to disrupt negotiations, and Respondent's action in instituting the intermittent employment and whipsaw lockout, was taken to harass and impede the bargaining agent and its members in the course of negotiations, and constituted bad faith bargaining and a refusal to bargain in good faith with the union, and thereby the Respondents have been and are violating Section 8 (a)(5) of the Act.

XV.

The action of the Respondents described above, relating to the intermittent employment and whipsaw lockout, when used as a counter measure against the strike and in bargaining, did discriminatorily deny regular employment to the listed employees named above to discourage membership in and adherence to the Union, and thereby Respondents have been and are violating Section 8 (a)(3) of the Act.

XVI.

The action of the Respondents described above, in refusing to bargain in good faith with the Union, and in locking out the listed employees in the circumstances described above, and disqualifying them from unemployment compensation, and in the Respondent's related actions and conduct, has been and is interfering with, restraining, and coercing their employees in the exercise of rights under Section 7, and thereby Respondents are and have been violating Section 8 (a)(1) of the Act.

XVII.

The acts and conduct of Respondents as set forth above are unfair labor practices that have occurred and are occurring in connection with their operations as described in paragraphs I, II, and III above, and have a close, intimate, and substantial relation to trade, traffic, and commerce between the several states of the United States and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Sections 2 (6) and (7) and 8 (a)(1), (3), and (5) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director of the Nineteenth Region, issues this Complaint against the Respondents above named, on this 11th day of October, 1957.

THOMAS P. GRAHAM, JR.,
Regional Director, National Labor Relations Board,
Region 19.

[Title of Board and Cause.]

ANSWER

The respondents Great Falls Employers' Council, Inc., Retail Food Dealers Division, and its member employers, Buttrey Foods, Inc., Safeway Stores, Inc., Paul A. Matteucci, d/b/a Matteucci's Super Save Market, Paul A. Matteucci, d/b/a Southgate Super Save Market, John Eustance, d/b/a White House Grocery, Robert Noble and John H. Noble, d/b/a Noble Mercantile Company, E. R. Fjelstad, d/b/a Al's Food Market, Wallace Anderson, d/b/a Wally's Superette, by way of answer to the complaint issued in the above entitled cause, admit, deny and allege as follows:

I.

Admit the allegations contained in paragraph I thereof.

II.

Deny that Wally's Superette is now a member-employer of Division, but admit the remaining allegations set forth in paragraph II thereof.

III.

Admit the allegations contained in paragraph III thereof.

IV.

Deny the allegations contained in paragraph IV thereof.

V.

Admit the allegations contained in paragraph V thereof.

VI.

Admit the allegations contained in paragraph VI thereof.

VII.

Deny the allegations contained in paragraph VII thereof. Affirmatively allege that prior to 1 April 1955, Division and union were parties to a collective bargaining agreement. On 29 January 1957, Union served on Division the notice attached hereto as Exhibit "A" and by this reference made a part hereof. That paragraph or section 19 of the agreement referred to in said notice provided in part as follows:

"The provisions of this agreement shall become effective on 1 April 1955 and shall remain in full force and effect through 31 March 1957 and yearly thereafter from 1 April through 31 March unless one of the parties hereto shall serve notice in writing upon the other party hereto not less than sixty (60) days prior to its expiration date or any anniversary thereafter. If such notice is served by either party hereto, this agreement shall terminate upon its expiration date."

On 8 February 1957, Division served on Union the notice attached hereto as Exhibit "B" and by this

reference made a part hereof. As a result of said notice and counter-notice, Division and Union bargained collectively from 29 January through 12 April 1957 in an attempt to reach an accord on an entirely new agreement to become effective at such time after 31 March 1957 as might be mutually acceptable.

VIII.

Admit the allegations contained in paragraph VIII of the complaint.

IX.

A) Admit the allegations contained in paragraph IX of the complaint stating that "On April 13, the Union instituted strike action to induce acceptance of its last proposal, by then withdrawing the employees and picketing the three stores of one member-employer, namely, Buttrey Foods, Inc. Prompted by this picketing of this member-employer, and to preserve the unity of their position, the remaining member-employers of the Division acting in concert and pursuant to instructions of their Division, suspended from employment and sent home, thereby locking out, all their employees in the unit represented by the Union." Deny all other allegations set forth in such paragraph IX.

B) Affirmatively allege that on 16 April 1957, Division caused to be delivered to Union the notice attached hereto as Exhibit "C" and by this reference made a part hereof.

X.

A) Admit the allegations contained in paragraph X of the complaint stating that "The locked out employees of the member-employers on the next business day applied to the Montana Unemployment Compensation Commission for benefits due to their lack of employment, and did so pursuant to instructions given them by their Union. The Respondents forthwith protested to said Commission against any payment of benefits to the locked out employees." Deny all other allegations set forth in such paragraph X.

B) Affirmatively allege that on 19 April 1957 all employer - members of Division except Buttrey Foods, Inc., offered all employees who had been locked out, temporary re-employment under the conditions set forth in Division's letter to Union and attached hereto as Exhibit "C". On 20 April 1957 Union attempted to further impair the interest of the member-employers of Division in bargaining on a group basis by circumventing Division and by transmitting directly to all of its member-employers the notice attached hereto as Exhibit "D" and by this reference made a part hereof, disparaging unified employer efforts and inviting separate bargaining.

C) Affirmatively allege that on 22 April 1957 the employer-members of Division failed to recall to work the employees who had been recalled for work on 19 and 20 April 1957. Allege that they failed to recall such employees to work at the insistence of

the struck stores Buttrey Foods, Inc. and in order to prevent the disintegration of their unity in the face of pressure from the struck stores and overtures by the Union to the employer-members in their individual capacities. Admit that in recalling the locked-out employees to work on 19 and 20 April 1957 and again on 26 and 27 April 1957 they were aware and had been advised that such action would prejudice the ability of such employees to secure unemployment compensation for the weeks of 14-20 April and 21-27 April 1957, if under the laws of the State of Montana and the rules, regulations and decisions of the Unemployment Compensation Commission of the State of Montana, such employees were otherwise qualified for compensation.

XI.

A) With respect to the allegations contained in paragraph XI of the complaint, respondents deny that the following named persons were locked-out:

1) Delores Daniels, Keith E. Keller, Verna Brown, Clarice Klundt, Joseph Chambers, Arlee Javner and Elmer Riley.

2) Richard Konesky, Leonard Moyer, Ben Peterson, Robert A. Dull, Stanley A. Marko, Patrick Lyons, Aaron Peterson, John Scott, Joseph Super, Marion R. Crawford, William Puzon, Frank Searle, Charles Bundi and Dan Meyer.

B) Respondents affirmatively allege that the persons specified in Group 1) above were not employed by any of the employer-members of Division at any time material hereto. Respondents affirmatively al-

lege that the persons specified in Group 2) above were not "regular" employees but were "call-in" or "part-time" employees, worked on an intermittent basis and that no action taken by the employer-members of Division at any time material hereto denied any of such persons employment to which they would otherwise have been entitled.

XII.

A) With respect to the allegations contained in paragraph XII of the complaint, respondents admit that the employees of Al's Food Market and Wally's Superette were given continuous employment after 19 April 1957. Respondents deny all other allegations set forth in paragraph XII of such complaint.

B) Respondents affirmatively allege that all of the employees listed in paragraph XII of the complaint except those identified as Group 1) in paragraph XI of this answer, were offered temporary employment on 19 and 20 April 1957, and again on 26 and 27 April 1957; that the employment on 27 April 1957 became regular by virtue of the fact Union and Division reached an accord on a new agreement on that day and the employment of those persons working on that day was made subject to such agreement.

XIII.

A) Deny the allegations set forth in paragraph XIII thereof.

B) Affirmatively allege that the action of respondents taken with respect to members of Union

between 12 and 27 April 1957 was taken to induce the Union to either strike all employer-members of Division or none.

XIV.

A) Deny the allegations set forth in paragraph XIV thereof.

B) Affirmatively allege that no collective bargaining agreement was in force and effect between Union and Division from and after 31 March 1957; that on and after 1 April 1957, all working terms and conditions of members of Union employed by employer-members of Division were open for negotiation and the appropriate subject of collective bargaining; that from 1 April through 12 April 1957 all terms and conditions expressed in the agreement which expired on 31 March 1957 were continued in effect by the tacit agreement of Division and Union; that on 13 April 1957, Union unilaterally modified the terms so continuing in effect, without notice to Division or its employer-members, by going on strike; that the modifications effected by Division and its member-employers (as set forth in Exhibit "C") were effected after notice to Union; that to require negotiation or collective bargaining by Division and Union before Division might effect such modifications under such circumstances is the equivalent of requiring the consent of Union to such modifications when no such requirement is imposed by the Labor-Management Relations Act of 1947, as amended; that Union was free to take such economic sanctions as it deemed appropriate either as

a defensive or retaliatory measure to Division's modifications; that such modifications and that all conduct of Division and its employer-members between 13 and 26 April 1957 facilitated and encouraged collective bargaining between Union and Division in that on 26 April 1957, and at no time prior to that, between 13 and 26 April 1957, Union requested a resumption of collective bargaining to which Division and its member-employers readily acceded and as a result of which an accord was reached on 27 April 1957.

XV.

A) Deny the allegations contained in paragraph XV of the complaint.

B) Affirmatively allege that when re-employment of the employees of Division's employer-members was offered on 19 and 20 and on 26 and 27 April 1957, as set forth in paragraph XII above, it was offered, without discrimination, to all employees.

C) Affirmatively allege that Division and its employer-members would have met similar concerted tactics on the part of non-union employees with the same defensive measures as those employed between 13 and 27 April 1957.

XVI.

A) Deny the allegations contained in paragraph XVI of the complaint.

B) Affirmatively allege that Division and its employer-members did not disqualify any employee

locked-out from unemployment compensation benefits under the laws of the State of Montana and under the rules, regulations and decisions of the Unemployment Compensation Commission of the State of Montana; affirmatively allege that under such law, rules, regulations and decisions Union disqualified from benefits any employees who were locked out by calling on strike that portion of the unit of employees employed by Buttrey Foods, Inc.

C) Affirmatively allege that the latest law of the State of Montana and the latest rules, regulations and decisions of the Unemployment Compensation Commission of the State of Montana pertinent to the payment of and the disqualification from unemployment benefits under the circumstances set forth in the complaint and this answer are as set forth in Exhibit "E" attached hereto and by this reference made a part hereof.

D) Affirmatively allege that the only impact of the conduct of Division and its employer-members upon the payment of any unemployment compensation benefits to which any locked-out employee might otherwise have been entitled, was to defer such payment pending appeal and final determination by the Unemployment Compensation Commission of the State of Montana.

XVII.

Deny the allegations set forth in paragraph XVII of the complaint.

As a separate and distinct affirmative defense, respondents allege as follows:

I.

The complaint issued in this cause is based upon amended charges executed and filed by Paul W. Hansen, International Vice President, RCIA on 11 October 1957. The charges so filed constitute a material variance from the original charges filed on 24 April 1957 by E. J. Rule, Corresponding and Financial Secretary of Retail Clerks International Association, Local Union No. 57, of Great Falls, Montana, the charging party, and thus constitute fresh or new charges.

II.

Retail Clerks International Association, Local Union No. 57 of Great Falls, Montana, the charging party, and the Retail Clerks International Association are separately chartered and are separate and distinct labor organizations within the meaning of the Labor-Management Relations Act of 1947, as amended.

III.

Respondents are informed and believe, and therefore state that Paul W. Hansen, as an International Vice President of Retail Clerks International Association, has no authority, by virtue of his office or the by-laws or constitution of either labor organization, to undertake the representation of Retail Clerks International Association, Local Union No. 57 in the filing of unfair labor charges, and cannot so act in the absence of specific authority so conferred upon him by Retail Clerks International Association, Local Union No. 57 of Great Falls, Montana.

IV.

Respondents are informed and believe, and therefore state that Paul W. Hansen was never authorized by Retail Clerks International Association, Local Union No. 57 of Great Falls, Montana to file the amended charges upon which the complaint in this cause is based; that such charges, as a result are not the charges of Retail Clerks International Association, Local Union No. 57 of Great Falls, Montana; that such charges having been improperly filed cannot act as the basis for the complaint issued in this cause and that the complaint in this cause and the issuance of any subsequent complaint in said cause are barred by the provisions of Section 10 (b) of the Labor Management Relations Act of 1947, as amended, more than six (6) months having elapsed since the date of the acts complained of.

GREAT FALLS EMPLOYERS'
COUNCIL, INC.,

/s/ By L. C. HARRIS,
Secretary,

On its own behalf and on behalf of Retail Food Dealers Division, and its member employers, Buttrey Foods, Inc., Safeway Stores, Inc., Paul A. Matteucci, d/b/a Matteucci's Super Save Market, Paul A. Matteucci, d/b/a Southgate Super Save Market, John Eustance, d/b/a White House Grocery, Robert Noble and John H. Noble, d/b/a Noble Mercantile Company, E. R. Fjelstad, d/b/a Al's Food Market, Wallace Anderson, d/b/a Wally's Superette.

State of Montana

County of Cascade—ss.

L. C. Harris, being first duly sworn, on his oath deposes and says:

He is the duly appointed, qualified and acting Secretary of Great Falls Employers' Council, Inc., a corporation authorized and existing under the laws of the State of Montana.

He makes this verification on behalf of Great Falls Employers' Council, Inc. and as one of its duly authorized representatives.

Great Falls Employers' Council, Inc. has been appropriately authorized to represent those of its employer-members who have been named in the above entitled cause as respondents.

He has read the within and foregoing answer, knows the contents thereof, and the matters therein set forth are true to the best knowledge, information and belief of affiant.

/s/ L. C. HARRIS.

Subscribed and Sworn to before me this 23rd day of October, 1957.

[Seal] /s/ MARY ANN LENNON,

Notary Public for the State of Montana, Residing
at Great Falls, Montana. My Commission Expires 21 January 1960.

[Title of Board and Cause.]

STIPULATION

It is stipulated and agreed by and between Great Falls Employers' Council, Inc., Retail Food Dealers Division, and its member-employers, Buttrey Foods, Inc., Safeway Stores, Inc., Paul A. Matteucci, d/b/a Matteucci's Super Save Market, Paul A. Matteucci, d/b/a Southgate Super Save Market, John Eustance, d/b/a White House Grocery, Robert Noble and John H. Noble, d/b/a Noble Mercantile Company, E. R. Fjelstad, d/b/a Al's Food Market, and Wallace Anderson, d/b/a Wally's Superette (herein called Respondents) and Retail Clerks International Association, Local No. 57, AFL-CIO (herein called the Union or Charging Party), and Melton Boyd, Counsel for the General Counsel of the National Labor Relations Board:

That the hearing fixed herein for December 9, 1957 shall be postponed, subject to the order of the Regional Director for the Nineteenth Region, to permit action by the National Labor Relations Board (herein called the Board) with respect to the submission of this matter by this Stipulation, which includes a statement of agreed facts;

That the parties waive a hearing before a Trial Examiner, the making of findings of fact and conclusion of law by a Trial Examiner, and issuance of an Intermediate Report and Recommended Order, and agree to submit this case for findings of fact, conclusions of law, and order directly by the Board, and to the transfer of this proceeding to

the Board for exercise of its power under Section 102.50 of the Rules and Regulations of the Board, Series 6, as amended;

That this Stipulation shall be filed with the Board, and if the Board accepts it in lieu of a hearing, the Board shall fix a time within which the parties may file Briefs with it;

That this Stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal or otherwise, which varies, alters, or adds to it, and this Stipulation is subject to the approval of the Board and shall be of no force and effect until the Board has granted such approval;

That this Stipulation is made without prejudice to any objection that any party may have as to the materiality or competency of any fact stated herein, and there is reserved to each party the right to contend for the inferences to be drawn from the agreed facts, and to contend for the conclusions of law that are germane to the facts;

That a Complaint and Notices of Hearing were issued herein by the General Counsel on behalf of the Board, by the Regional Director for the Nineteenth Region, acting pursuant to authority recited in said Complaint, upon Charges and Amended Charges filed by the Union, each of which was duly served on the Respondents as shown in the attached General Counsel's Exhibit 1, which is incorporated herein by this reference;

That the Answer of the Respondents to the Complaint was duly filed with the Regional Director,

as shown and incorporated in General Counsel's Exhibit 1;

That the documents comprising General Counsel's Exhibit 1, together with this Stipulation, shall constitute the entire record in this case, and that no oral testimony is necessary or desired by any of the parties;

That the Exhibits A, B, C, D, and E, attached to the Respondent's Answer, by this reference are incorporated in the following statement of agreed facts, and the additional Exhibits F through N, attached to this Stipulation, are by this reference incorporated in said statement of agreed facts, provided that there is reserved to each party the right to object to the relevancy or competency of any part of any Exhibit;

That the agreed facts are as follows:

I.

Great Falls Employers Council, Inc., hereinafter called Council, is a non-profit corporation organized and existing under the laws of the State of Montana, having as members various employers engaged in various businesses who are grouped in various divisions of the Council's operations. Council has a Retail Food Dealers Division, hereinafter referred to as Division, which is and has been an association of member-employers engaged in retail sales of food in Great Falls, Montana. This Division is and has been the agent of its member-employers in representing them in collective bar-

gaining and adjustment of grievances with labor organizations. The gross annual retail sales of its member-employers exceed \$10,000,000 and their gross annual purchase of merchandise delivered to them from sources outside the State of Montana exceed \$1,000,000 for goods shipped directly to them and exceed \$2,000,000 for goods previously shipped in from out of state but sold and delivered to them from local warehouses.

II.

The Division at all times relevant hereto has had as its member-employers the following firms, hereinafter referred to by their trade-names, whose ownership is shown as follows:

- (1) Buttrey Foods, Inc., a corporation.
- (2) Safeway Stores, Inc., a corporation.
- (3) Matteucci's Super Save Market, owned by Paul A. Matteucci.
- (4) Southgate Super Save Market, owned by Paul A. Matteucci.
- (5) White House Grocery, owned by John Eustance.
- (6) Noble Mercantile Company, owned by Robert Noble and John H. Noble.
- (7) Al's Food Market, owned by E. R. Fjelstad.
- (8) Wally's Superette, owned by Wallace Anderson.

III.

The Division and the member-employers, hereinafter referred to collectively as Respondents, are

engaged in business which is in commerce and affect commerce within the meaning of Section 2 (6) and (7) of the Act.

IV.

Retail Clerks International Association, Local No. 57, AFL-CIO, hereinafter called Union, is organized for the purpose, in part, of representing employees in the employ of Respondents in collective bargaining with Respondents, respecting wages, hours, and working conditions, and has its principal office in Great Falls, Montana, and is a labor organization within the meaning of Section 2 (5) of the Act.

V.

The following unit of employees is appropriate for collective bargaining and has been the unit with respect to which there has been bargaining between the Division and the Union:

All sales clerks, checkers, grocery or produce clerks, receiving or shipping clerks, stock clerks, order clerks, light parcel delivery men, jumpers, boxout boys, sackers and wrappers of employers in the Retail Food Dealers Division of the Great Falls Employers' Council, excluding supervisory employees as defined in the Act.

In 1948 the Division was known as the Retail Employers' Division of the Council, and was composed of all types of retail stores, which recognized and dealt with the Union as the authorized representa-

tive of their employees in a multi-employer bargaining unit. In 1954, by mutual consent of the employers involved, the Council, and the Union, that group of employers was divided into two segments and the Retail Food Dealers Division was formed for the purpose of collective bargaining respecting grocery clerks only. Since 1954 the Division has been recognized by and dealt with by the Union as composed of member-employers having in their employ an appropriate multi-employer unit of employees.

VI.

The Union at all times material has been and is the bargaining representative chosen by a majority of the employees in the unit described in paragraph V.

VII.

On or about 22 April 1955, Division and the Union executed a collective bargaining agreement, effective 1 April 1955, as set forth in Exhibit F attached. On 23 January 1957, the Union issued and thereafter served on the Division the notice appearing as Exhibit A. On 8 February 1957, the Division issued and thereafter served on the Union the notice appearing as Exhibit B. As a result of said notice and counter notice, the Division and the Union bargained collectively from 22 February through 12 April 1957 in an attempt to reach an accord on terms to be embodied with other terms not then in dispute in an agreement to become ef-

fective at such time after 31 March 1957, as might be mutually acceptable.

VIII.

The collective bargaining of the Division and the Union continued throughout the period specified in paragraph VII, during which seven negotiating meetings were held, including three attended by a Conciliator from the Federal Mediation and Conciliation Service. By 31 March 1957, the expiration date of the existing contract, no new agreement had been reached. On 12 April 1957, Council submitted through the Federal Mediation and Conciliation Service its "final proposal", a copy of which is attached as Exhibit G. On that same afternoon a meeting was held, with the Conciliator present, when this proposal was slightly altered by the Council. At a meeting of the Union on that evening, the Union elected to reject the Council's final proposal. Thereupon the Union voted to strike one employer-member of the Council, and its Executive Board made the determination that the Union would strike Buttrey Foods, Inc.. The Union advised its members that in the event of a lockout, all locked out employees should register with the Montana Employment Service to secure other jobs and to be eligible for unemployment compensation. Union members were informed that strikers would not, and others might not, receive unemployment compensation because of the existence of a labor dispute.

IX.

On Saturday morning, 13 April 1957, the Union instituted its strike action by the withdrawing of employees and picketing the three stores of Buttrey Foods, Inc. Prompted by this picketing of this member-employer and to preserve the unity of their position, the remaining member-employers of the Division, acting in concert and pursuant to instructions of their Division, suspended from employment and sent home, thereby locking out, all their employees in the unit represented by the Union. The Union struck no other member-employer of the Council, and admittedly at that time intended to strike no other stores. The Union did not picket any of the stores which had locked out its employees. Buttrey Foods, Inc. subsequently closed one of its three stores for the duration of the strike. All stores where employees were locked out continued to operate on Saturday, 13 April 1957. On Monday, 15 April 1957, Safeway Stores, Inc. closed two of its four stores for the duration of the strike. All other stores continued to operate at all times during the strike. On 15 April 1957, the Division issued and thereafter caused to be delivered to the Union its letter which appears as Exhibit C.

X.

Most of the locked out employees of the member-employers on Monday, 15 April 1957, applied to the Montana Unemployment Compensation Commission for benefits due to their lack of employ-

ment, doing so pursuant to instructions given them by the Union. The Respondents forthwith protested to said Commission against any payment of benefits to the locked out employees. The Montana Unemployment Compensation law provided that unemployed persons meeting the qualifications of that law shall be entitled to \$32.00 per week for a period of 22 weeks, and that casual employment not exceeding one day and wages not exceeding \$15 per week will not disqualify an employee. Additional provisions of that law respecting eligibility appear as Section 87.106 (d), in Exhibit E. The Respondents, taking note of prior decisions of the Montana Unemployment Compensation Commission, admittedly then sought ways and means of curtailing what they thought to be an unprincipled use of the Montana State Unemployment Compensation Fund. Being advised that a direct protest and a definitive appeal would take from weeks to years and that compensation might nevertheless be paid pending the appeal, they sought means of effectively preventing payment of unemployment compensation to the locked out employees pending an appeal. They concluded that an offer of partial re-employment which would extend longer than one shift and would permit the locked out employees to earn \$16 per week would have three consequences, any one of which would disqualify the locked out employees from receiving unemployment benefits:

1. If the Union directed the employees not to return to work, they would become strikers and

would clearly not be entitled to benefits under prior decisions of the Commission.

2. If the employees individually declined offered employment, they would disqualify themselves for benefits under the provision of the law.

3. If they returned to work for \$16 per week, they disqualified themselves from benefits under the law.

Under these circumstances on 15 April 1957 the Division issued the notice to the Union, Exhibit C, that it would no longer observe the union contract, and on 18 April 1957 protested payment of unemployment compensation as set forth in the attached Exhibit H. Each member-employer issued written notice of recall to each of his locked out employees on 17 April 1957 in the form attached hereto as Exhibit I, and followed up each notice with telephone calls requesting employees to return to work on 19 April 1957, at a specified hour. This temporary re-employment was under those terms and conditions which had been set forth in Division's letter to the Union, Exhibit C, and eliminated any guarantee of minimum weekly wage or of minimum hours of work in one day. On 19 April 1957 the Respondents ran full-page advertisements in the morning and evening newspapers in Great Falls in the form of the attached Exhibit J. In recalling the locked out employees to work on 19 and 20 April, 1957, and again on two days in the week that followed, Respondents had been advised that such action would prejudice the ability of such employees to secure unemployment compensation for the weeks

of 14-20 April and 21-27 April, 1957, if under the laws of the State of Montana and the Rules, Regulations, and Decisions of the Unemployment Compensation Commission of the State of Montana, such employees were otherwise qualified for compensation. When the employees requested guidance from the Union, they were urged to comply with their employer's wishes. As employees returned to work, they admittedly were advised that their re-employment was to circumvent the unemployment compensation. On 20 April, 1957, after each employee had earned a total of \$16 on 19 and 20 April, 1957, each employee was once again released. Those locked out employees who had obtained other jobs and were ineligible for unemployment compensation were given a choice by Respondents of returning to work for the limited period or continuing with their other jobs. Re-employed employees worked a full day Friday, 19 April 1957, but only one or two hours on Saturday, 20 April 1957, at various staggered hours. Apprentices were worked longer hours to earn in excess of \$15, and in one case an employee who became sick was credited in conformity with his employer's policy with earned sick leave to entitle him to draw in excess of \$15. No employees were permitted to work a full day on Saturday, 20 April 1957. On that date the Union wrote the Division and each of the member-employers a letter, which was delivered that same day, appearing as Exhibit D. The Union also responded to the advertisement of Respondents, Exhibit J, by issuing a handbill in the form of Exhibit N.

XI.

The locked out employees, being those of all member-employers except Buttrey Foods, Inc., listed under the names of their respective employers, were the following:

Safeway #1855—Central Avenue

Fate Brewer, Jr.	*Ben Peterson
Glen Bridgeford	Helen Pittman
*Richard Konesky	Billy B. Young
*Leonard Moyer	

Safeway #1856—North

Arlene Bauer	Neil J. McRorie
Margaret Clausen	*Stanley A. Marko
*Robert A. Dull	Patrick Lyons
Jean Hallan	*Aaron Peterson
Richard L. Hamers	*David S. Scott
Lydell Jurasek	*John Scott
Phil A. Keller	Grace Simonton
Cecelia Krall	*Joseph Super
June M. Leiby	Lionel Swanson, Jr.
Jack McConnel	Alice Lorraine Tenney

Safeway #1857—West Side

Rose Marie Andrews	Arthur L. Raunig, Jr.
Marion R. Crawford	Dorothy K. Rio
Herbert F. Hart	Freedra Rosbarsky
Patrick O'Connell	Donna J. Sanders
Peder G. Pederson	*Frank Searl
Joyce Ann Perrigo	Margaret Tempel
*William Puzon	Leah Walbon

Safeway #1865—Southeast

Louise Armstrong	Irmen L. D. Knerr
Helen M. Axtman	Nettie Korin
Verna Brown	Alvin Ladd
*Charles Bundi	Peter K. Meras
Dolores Daniels	*Dan Meyer
Charlotte Golberg	Joseph Meyer
Jack Itami	Paul Pfeifle
Frances E. Kelly	

Super Save Market

Verlyn Brown	Irene I. Major
Joseph Chambers	Thomas S. Marshall
*Lorrin A. Darby	*Jerry Mitchell
*Gayle Garrity	Doris Paulson
*Richard Gasvoda	*Donn Peterson
Charlene Gleason	Georga F. Potts
Everett W. Greenbush	Robert E. Purcell
Patsy A. Holmes	Dewain D. Ryan
*Arlee Javner	Darrell D. Schwen
Gertrude Kendall	Daryl A. Soltesz
*Barbara Koesler	Leonard J. Weaving
Doris Madison	*Stuart Wilson

Southgate Super Save Market

Madlee Anderson	Robert C. Gill
Helen M. Burns	*Ken Roeben, Jr.
Helen P. Gabbert	Wilford G. Smith
Lucille Habel	Stanley L. Timms
*Tony Kraft	Helen Wheeler

White House Grocery

Joett E. Aman

Laurence Love

Rose Cadieux

Georgia Vining

Harry Kimmerle

Noble Mercantile

William Gosney

Alta Kopetski

Al's Food Market

Wally's Superette

Lucille Sowa

Lester Oswald

The persons indicated with the mark of the asterisk (*) above were not "regular" employees, but were "call-in" or "student" employees who had worked on an intermittent basis, whose employment in the work weeks of 14-20 April and 21-27 April was for periods of time less than their respective normal periods of part-time employment.

XII.

The employees listed in paragraph XI above were offered temporary employment on 19 and 20 April 1957, and again on 26 and 27 April 1957, in carrying out the Respondents' plan for part-time employment described in paragraph X above, except for the employees of Al's Food Market and Wally's Superette who were given continuing employment when recalled on 19 April 1957, and except that the employment of the remaining employees on 27 April 1957 became regular by virtue of the fact that the Union and Division reached an agreement

on that date and the employment of all persons on that date was made subject to such agreement.

XIII.

No collective bargaining agreement was in force and effect between the Union and the Division after 31 March 1957. From 1 April to 12 April 1957, all terms and conditions expressed in the agreement which expired on 31 March 1957 were continued in effect by the tacit agreement of the Division and the Union. Following the institution of the strike and the lockout on 13 April 1957, no negotiations between the Union and the Division took place until Wednesday, 24 April 1957, when the Union called the Council and asked to meet again in negotiations. A meeting was held on that afternoon, when the Union presented a proposal, styled "Second Revised Proposal" as set forth in attached Exhibit K. Respondents agreed to accept all items on the first page of this proposal, and various offers and counter offers were made concerning wages and the employment of students as set forth in the second page. At the end of the meeting the Union and the Respondents were one cent (1c) apart on wages payable to full-time employees, and in disagreement over terms with reference to student employees. On 24 April 1957 another meeting was held at which the Union presented two alternative proposals on wages and in reference to student employees as set forth in attached Exhibit L. Respondent accepted the first of these proposals, thereby reaching an agreement with the Union on

all terms to be embodied in the contract to be operative for a two-year period following 1 April 1957. On 26 April 1957 a memorandum of agreement was executed in the form set forth in attached Exhibit M. On 27 April 1957 and thereafter, as above stated, employees of Respondents were employed under the terms and conditions agreed to on the preceding day.

XIV.

On 24 May 1957 the Montana Unemployment Compensation Commission unanimously denied the payment of unemployment compensation to the locked out employees, by adopting as its own findings and conclusions those of its Supervising Claims Examiner, which findings and conclusions appear as Exhibit E. The Union has appealed this decision, which appeal is now pending.

XV.

The General Counsel moves, without objection of any party, to amend the Complaint in this proceedings by deleting from Paragraph XI thereof those names of persons whose names do not appear in Paragraph XI of this stipulation, to-wit: Keith Keller, Clarice Klundt, and Elmer Riley, and by transposing the name of Delores Daniels from the list of Safeway #1856 to the list of Safeway #1865.

Respectfully submitted this 5th day of December, 1957.

Great Falls Employers' Council, Inc., Retail Food Dealers Division, and Its Member Employers, Buttrey Foods, Inc., Safeway Stores, Inc., Paul A. Matteucci, d/b/a Matteucci's Super Save Market, Paul A. Matteucci, d/b/a Southgate Super Save Market, John Eustance, d/b/a White House Grocery, Robert Noble and John H. Noble, d/b/a Noble Mercantile Company, E. R. Fjelstad, d/b/a Al's Food Market, Wallace Anderson, d/b/a Wally's Superette,

/s/ By HOWARD C. BURTON,
Counsel for Respondents.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL No. 57, AFL-CIO,

/s/ By LEO GRAYBILL, JR.,
Counsel for Charging Party.

/s/ MELTON BOYD,
Attorney, Counsel for the General Counsel, National Labor Relations Board.

EXHIBIT "A"

[Handwritten: Rec'd 1/29/57.]

[Insignia Retail Clerks Union]

Great Falls Local No. 57

Headquarters

P. O. Box 1202

V.F.W. Building

Great Falls, Montana

January 23, 1957

Great Falls Employers Council

Retail Food Dealers Division

c/o Mr. Edward C. Burton Counsel

P. O. Box 1403

Great Falls, Montana

Gentlemen:

Retail Clerks International Association, Local Union No. 57, Great Falls, Montana, hereby serves notice upon you, in accordance with the provisions of Section 19 of the current Agreement in force between the parties, of our intention to open for negotiations the sections of the agreement set forth below:

Section 2-A. Union proposes that the phrase "a majority of whose work" be re-phrased, "a substantial part of whose work"; box-out boys to be dropped from the paragraph; the phrase concerning supervisory employees to be dropped from the paragraph.

Section 3. Union proposes to open all of this sec-

Exhibit "A"—(Continued)

tion for such re-definition and clarification as may be necessary.

Section 4-D. Union proposes to clarify and emphasize 4-D by stating that employees will not be paid below the regular scale unless classification determination specified in (illegible) has actually been made by the Union and the Employer.

Section 6-B. Union proposes that the first paragraph of 6-B be eliminated as no longer applicable and that the second paragraph of 6-B be made to read "During the term of this agreement the work week shall * * *"

Section 6-C. The Union proposes this be dropped from the agreement.

Section 7. Union proposes that all the wage paragraphs of Section 7 be opened and that wage scales be raised 30c an hour and that the wage scale for male and female journeymen clerks be equalized.

Section 7-D. All of Section 7-D to be withdrawn from the agreement.

Section 8-A. Sub-paragraph (1) should be dropped as inapplicable and Sub-paragraph (2) should be incorporated in the body of the heading of Section 8-A.

Section 8-B. Union proposes that Sub-paragraph (1) include an hourly rate of \$5.00 for time worked after 6:00 P.M., plus \$2.00 supper money; that

Exhibit "A"—(Continued)

Sub-paragraph (2) include double time on Sundays and holidays.

Section 9-B. Union proposes that Section 9-B include provision that all Sunday inventories except one be compensated for by an hourly rate of \$5.00.

Section 12-A. Union proposes that a provision be included in this section which provides for three weeks vacation after five years employment by one Employer.

Section 19-A. Union proposes that the term of the proposed agreement be one year.

In a few places in the present agreement, dates should be changed to correspond to the new agreement dates but these have not been listed above.

The Union will have its bargaining committee selected by February 1st and would be happy to meet with representatives of the Employers Council at any time after that time. Union urges that early meetings be scheduled since there are many matters to be considered before the present agreement expires.

Respectfully submitted,

RETAIL CLERKS LOCAL
UNION No. 57,

/s/ E. J. RULE,

Corresponding and Financial
Secretary.

EXHIBIT "B"

Great Falls Employers' Council, Inc.

Box 1403 Great Falls, Montana Phone 2-2415

February 8, 1957

Retail Clerks Local Union No. 57

P. O. Box 1202

Great Falls, Montana

Att'n: Mr. E. J. Rule, Corresponding and
Financial Secretary

Re: Labor Agreement—Retail Food Dealers Division
Retail Clerks Local Union No. 57—1957

Dear Mr. Rule:

Your letter of 23 January 1957 opening the above agreement for re-negotiation was received by this office on 29 January 1957. In response thereto, please note that in negotiations which will ensue the employers will desire to discuss modification of the following provisions:

1. Delete paragraph 7 B) from the agreement.
2. Reduce the reporting pay requirements of paragraph 7 C) to two hours.
3. Revise paragraph 11 A) by the deletion of Armistice Day.
4. Delete paragraph 11 B).
5. Delete paragraph 11 D).
6. Modify paragraph 12 E) by stating that no employee who voluntarily terminates his employ-

Exhibit "B"—(Continued)

ment within nine (9) months or is involuntarily terminated within six (6) months shall be entitled to participation in vacation benefits provided that after he is employed for nine (9) months he shall accrue vacation benefits retro-actively to the date of his employment.

7. Delete the words lay-offs or discharges and laid off or discharged in the first two sentences of paragraph 14 B) and substitute the word termination therefor.

8. Modify paragraph 16 to read as follows: Representatives of the union shall not interfere with the duties of employees. Neither the collection of union dues nor the transaction of union business will be achieved on the employer's premises or the employer's time.

9. Delete the following words from paragraph 18 C): "* * * provided that the status quo as it existed immediately prior to the time the claim or grievance arose shall be maintained."

10. The employers wish to open the effective and terminal dates as set forth in paragraph 19 of the agreement.

Cordially yours,

GREAT FALLS EMPLOYERS'
COUNCIL, INC.,

/s/ By HOWARD C. BURTON,
Of Counsel.

HCB:mal

EXHIBIT "C"

[Letterhead Great Falls Employers' Council, Inc.]

15 April 1957

Retail Clerks Local Union No. 57

510 First Avenue North

Great Falls, Montana

Re: Labor Agreement and Relationship, Retail
Food Dealers Division, GFEC, Inc.

Gentlemen:

In the course of negotiations had on the above agreement on 12 April 1957, the employers submitted in writing a complete and final proposal to your committee through Mr. Bob McClelland, Commissioner, Federal Mediation and Conciliation Service. This proposal was dated 12 April 1957.

During the late evening of 12 April 1957, the employer representatives of the Retail Food Dealers Division of this Council were advised by Commissioner McClelland that the proposal above referred to had been rejected by the union membership voting 65 to 42 against the same, and that your organization planned to go on strike on the morning of 13 April 1957. Commissioner McClelland did not advise the employer representatives whether it was your intent to strike all or only some of the companies comprising the Retail Food Dealers Division of this Council.

On the morning of 13 April 1957, the members

Exhibit "C"—(Continued)

of your organization employed in the three (3) stores of Buttrey Foods, Inc., one of the eight (8) companies constituting the Retail Food Dealers Division of this Council, did go on strike against and commenced the picketing of those three (3) stores.

To preserve their interest in group bargaining, as guaranteed by law, and as a defensive response to your strike, the remaining employers constituting the Retail Food Dealers Division, that is Al's Food Market, Matteucci's Super Save Market, Noble Mercantile Company, Stores 1855, 1856, 1857, 1865 of Safeway Stores, Inc., Southgate Super Save Market, Wally's Superette and White House Grocery, locked out those of their employees covered by the above contract and which is the subject of this labor dispute.

You are undoubtedly aware, that no contractual arrangement now exists between your union and the Retail Food Dealers Division of this Council, since the contract was opened by appropriate notice and counter-notice, all required federal notices were filed, and the contract, by its own terms expired on 31 March 1957.

In the light of these circumstances, you are advised that the employers hereby withdraw the written offer extended to you on 12 April 1957 and no longer regard themselves as bound by any of the terms and conditions of the expired contract. Further, the employers will no longer honor any of the working terms, conditions or other provisions

Exhibit "C"—(Continued)

set forth in the former contract except the following:

A) The basic hourly rates of pay set forth in paragraph 7 A) 2), without minimum weekly guarantee.

B) The vacation provisions set forth in paragraph 12, sub-paragraphs A), B), C) and E). Vacation leave and pay which has been accrued under the expired contract will continue without interruption, in order that the rights of employees shall not be impaired, and until a new agreement is reached, eight (8) hours work shall count as one (1) day's work for the purposes of continued accrual.

Cordially yours,

GREAT FALLS EMPLOYERS'
COUNCIL, INC.,

/s/ By HOWARD C. BURTON,
Of Counsel.

HCB:mal

EXHIBIT "D"

[Stamped: Received April 22, 1957.]

April 20, 1957

Super-Save Grocery and South Gate Grocery
Safeway Stores
White House Grocery
Noble Mercantile Company
Wally's Superette
Al's Grocery

Gentlemen:

Last week after Retail Clerks Local No. 57 struck Buttery Grocery Stores, other members of the Retail Food Dealers Division of the Great Falls Employers Council, including yourself, locked out Local 57 employees. In doing so, you apparently relied on your counsel's advice concerning the recent case of National Labor Relations Board vs. Buffalo Linen Supply Co. Local No. 57 has no quarrel with the position taken by the Supreme Court in that case. However, on Friday and Saturday, April 19th and 20th, you hired back your locked-out clerks.

This letter should be considered notice to you that the Union would consider any further lockout to be an unfair labor practice within the scope and spirit of Section 8a of the Taft-Hartley Act.

The Supreme Court's holding in the Buffalo Linen Supply case was limited to the proposition that a multi-employer bargaining unit could protect itself from a whipsaw strike by locking out em-

Exhibit "D"—(Continued)

ployees after the Union representing them had struck one member of the group. The Supreme Court makes it clear that this does not sanction lockouts generally, and that lockouts to destroy or undermine bargaining representation, to evade the duty to bargain, and especially layoffs based on reprisal, are not sanctioned.

It is clear that you do not consider your multi-bargaining unit endangered because of hiring back your employees before the issues between the bargaining unit and the Union were resolved. Further lockouts will be considered in the nature of reprisals by the Union and the Union will have to take the necessary legal steps to protect its members under the terms of the Taft-Hartley Act if further lockouts occur.

It is the sincere wish of Local No. 57 that further disruption of grocery distribution in the Great Falls area can be avoided and that negotiations culminating in a satisfactory settlement for all parties can be speedily concluded.

Very truly yours,

RETAIL CLERKS UNION
LOCAL No. 57,

/s/ By LEO GRAYBILL, JR.,
Of Counsel.

cc-Great Falls Employers' Council.

EXHIBIT "E"

Chapter 140, Montana Session Laws of 1957:

"Section 87-103, Benefits

(b) Weekly benefit amount—

Such benefit shall be not more than thirty-two dollars (\$32.00) per week nor less than ten dollars (\$10.00) per week."

"Section 87-104, Duration of Benefits

The maximum total amount of benefits payable to any eligible individual during any benefit year shall not exceed twenty-two (22) times his weekly benefit amount."

"Section 87-106, Disqualification for Benefits

* * * * *

(d) For any week with respect to which the commission finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that—

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;

Provided, that if in any case separate branches

Exhibit "E"—(Continued)

of work which are commonly conducted as separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment, or other premises; provided, further, that if the commission, upon investigation, shall find that such labor dispute is caused by the failure or refusal of any employer to conform to the provisions of any law of the state wherein the labor dispute occurs or of the United States pertaining to collective bargaining, hours, wages or other conditions of work, such labor dispute shall not render the workers ineligible for benefits."

"Section 87-107, Claims for Benefits

* * * * *

(b) Initial determination. A representative designated by the commission, and hereinafter referred to as a deputy, shall promptly examine the claim and, on the basis of the facts found by him, shall either determine whether or not such claims valid, and if valid, the week with respect to which benefits shall commence, the weekly benefit amount payable and the maximum duration thereof, or shall refer such claim or any question involved therein to an appeal tribunal which shall make its decisions with respect thereto in accordance with the procedure prescribed in subsection (c) of this section, except that in any case in which the payment or denial of benefits will be determined by the provisions of Section 87-106 (d), the deputy shall

Exhibit "E"—(Continued)

promptly transmit his full finding of fact with respect to that subsection to the commission, which, on the basis of the evidence submitted and such additional evidence as it may require, shall affirm, modify, or set aside such findings of fact and transmit to the deputy a decision upon the issues involved under that subsection which shall be deemed the decision of the deputy. The deputy shall promptly notify the claimant and any other interested party of the decision and the reasons therefor. The deputy may for good cause reconsider his decision and shall promptly notify the claimant and such other interested parties of his amended decision and the reasons therefor. Unless the claimant or any such interested party, within five (5) calendar days after delivery of such notification or within seven (7) calendar days after such notification was mailed to his last known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith. If an appeal is duly filed, benefits with respect to the period under dispute prior to the final decision of the commission, shall be paid only after such decision. Provided, that if an appeal tribunal affirms a decision of a deputy, or the commission affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid."

Exhibit "E"—(Continued)

"Section 87-149, Definitions

(a) Total unemployment:

(1) An individual shall be deemed 'totally unemployed' in any week during which he performed no services and with respect to which no wages are payable to him.

(2) An individual's week of unemployment shall be deemed to commence only after his registration at an employment office, except as the commission may by regulation otherwise prescribe.

(3) As used in this subsection the term 'wages' shall include only that part of remuneration for odd jobs or subsidiary work, or both, which is in excess of fifteen dollars (\$15.00) in any one week, and the term 'services' shall not include that part of odds jobs or subsidiary work, or both, for which remuneration equal to or less than fifteen dollars (\$15.00) per week is payable, or for one (1) day's work not exceeding eight (8) hours, and any over-time worked immediately following such eight (8) hours, whichever is greater."

"Section 87-102, Declaration of State Public Policy

As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Involuntary unemployment is therefore a subject to general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often

Exhibit "E"—(Continued)

falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure under the police powers of the state for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

May 14, 1957

To: Chadwick H. Smith, Chairman

Unemployment Compensation Commission
Examiner

From: Charles Peterson, Supervising Claim
Examiner

Subject: Labor Dispute: Retail Clerks International Association, Local Union No. 57 vs. Buttrety Food Stores (No. 23, 26, and 28) of Great Falls, Montana, a member of the Great Falls Employers' Council, Inc.

The Great Falls Employment Security Office informed this office on April 18, 1957 that a labor dis-

Exhibit "E"—(Continued)

pute was in existence between the Retail Clerks International Association, Local Union No. 57 and Buttrey Food Stores No. 23, 26, and 28 of Great Falls. This labor dispute was settled April 26, 1957.

Members of Retail Clerks Local Union No. 57 and Meat Cutters and Butchers, Local Union No. 479 have filed claims for unemployment benefits as a result of the labor controversy. I am, therefore, in accordance with the provisions of Section 87-107 (b) of the Montana Unemployment Compensation Law transmitting to the Commission herewith all claims concerned.

To date, sixty-five (65) claims have been filed by members of Retail Clerks and Meat Cutters Local Unions. These claimants' names are listed by employer, union membership, date and type of claim on pages 2, 3 and 4 of this transmittal. The status of claims filed indicates that eight continued could be compensable.

(N.B. Pages 2, 3 and 4 of the exhibited report have been omitted, the names of the claimants not being pertinent.)

Findings:

The Great Falls Employers' Council, Inc. contended that a labor dispute existed between the Council and the Retail Clerks Local No. 57, Retail Food Dealers Division. The Employer Council represents the following food stores:

Buttrey Foods, Inc.

Matteucci Super Save

Safeway Stores

Exhibit "E"—(Continued)

Wally's Superette

Al's Food Market

Noble Mercantile Co.

Southgate Super Save Market

Whitehouse Grocery

The Retail Clerks Local No. 57 contends that a labor dispute exists only with Buttrey Food Stores #23, 26 and 28 and that members of Local No. 57 are locked out by Matteucci, Super Save, Safeway Stores, Wally's Superette, Noble Mercantile Co., Southgate Super Save Market, and Whitehouse Grocery.

Available information indicates that a labor dispute was in existence between Local No. 57 and the Buttrey Stores beginning on or about April 13, 1957 and ending April 26, 1957.

On April 18, 1957 the Great Falls Employers' Council, Inc. wrote to the manager of the Great Falls Employment Service office, enclosing rosters of employees of the food stores listed in paragraph one.

Roster #1. All employees of Buttrey Foods, Inc. The employees are listed in two categories:

(1) Retail Clerks who are on strike.

(2) Butchers and other meat employees for whom work is available, but who refuse to cross the picket lines of Local No. 57.

Roster #2. Retail Clerks employed by the food stores listed in paragraph two.

Roster #2 carries the remark that the employees were "locked out."

Exhibit "E"—(Continued)

The Council, on behalf of all employers involved, protests the payment to the claimants listed on Rosters #1 and 2 of any unemployment compensation on two (2) grounds:

1. The employees have declined to accept work offered to them and there is no evidence that they are not physically or mentally qualified to accept and perform the same.

2. Each of such employee is involved in a work stoppage which exists because of a labor dispute at the establishment where he is employed.

Article 19 A of the expired union contract provides:

"The provisions of this agreement shall become effective on 1 April 1955 and shall remain in full force and effect through 31 March 1957 and yearly thereafter from 1 April through 31 March unless one of the parties hereto shall serve notice in writing upon the other party hereto not less than sixty (60) days prior to its expiration date or any anniversary thereafter. If such notice is served by either party hereto, this agreement shall terminate upon its expiration date."

Available information indicates that Local No. 57 served notice to the Council by registered mail on January 29, 1957. Since the contract had expired, a labor dispute at Buttreys Foods, Inc. would not necessarily involve the Retail Clerks employed at other Great Falls Food Stores.

The food stores listed in paragraph two sent their employees specific notices to report on Friday,

Exhibit "E"—(Continued)

April 19, 1957. Available information indicates that these employees reported for work and were sent home again by their employers on Saturday, April 20, 1957.

Leo Graybill, Counsel for the Retail Clerks Union Local No. 57, furnished Mr. Menager, manager of the Great Falls Employment Service office, the following statement regarding lockout of grocery clerks in Great Falls between April 13 and April 25, 1957:

"On Saturday, April 13, 1957, Safeway Stores, Inc., Matteucci's Super Save Market, Southgate Super Save Market, White House Grocery, Noble Mercantile Company, Al's Grocery and Wally's Superette, locked out their grocery clerk employees. At that time the Retail Clerks Union had **struck** three Buttrey Food Stores in Great Falls. The Union made no attempt to extend the picketing or to strike stores other than Buttrey's. It had not planned and never did plan to strike any of them.

"All eligible employees were notified by the Union to report to the Montana State Employment Office and register as required by law.

"On Thursday, April 18, 1957, employees at the above mentioned stores were called by their employers and told to return to work on Friday morning, April 19th. When employees requested guidance from the Union, they were urged to comply with their employer's wishes. On Friday, April 19th, all employees still available (some had left town temporarily or were otherwise employed) went

Exhibit "E"—(Continued)

to work for their respective employers listed above. These employees worked all day Friday and were told to report for work Saturday, April 20th, at various hours. They did so. During Saturday, April 20th, but at different staggered hours, they were all laid off. Most employees worked only 1 hour Saturday, although some worked longer. None were allowed to work Monday, April 22nd, although many reported for work.

"All of the employees recalled were allowed and required to earn \$15.00 or more. Apprentices were worked longer to qualify for \$15.00 or more. In one case, the employee, Lionel Swenson, became sick and he was "given" some time so he would draw at least \$15.00. None of the employees were allowed to work a full day Saturday, April 20th, and all were laid off without a full second day. Many were laid off with only 1 hour in on Saturday, April 20th, although the Agreement still in force between the Stores and the Union provides for four hours reporting per pay day.

"Each manager and/or owner at their respective stores indicated to their employees on Saturday, April 20th, that the purpose of bringing them back to work was to let them earn enough to defeat claims for unemployment compensation."

The Employer Council contends that work is available at the Buttrey Foods, Inc. for butchers and other meat department employees, but they will not cross the picket lines. The Manager of the Great Falls local office requested a statement from

Exhibit "E"—(Continued)

the Meat Cutters and Butchers, Local No. 479, but to date none has been furnished. Claimant Minya Lamb, member of Local 479 and employee of Buttrey Foods Inc. reported she could not report for work at Buttreys Foods because her union Local 479 had voted not to cross the picket line of the Retail Clerks.

Claimant Mary Hinrichsen filed an initial claim for benefits on April 25, 1957, effective date April 21, 1957, showing her last employment from April 16, 1957 to April 20, 1957 with the Rexall Lunch counter, Great Falls, Montana. The reason for separation was "Temporary job." The claim further indicates that she was employed by Buttrey Foods, Inc. from August 30, 1953 to April 12, 1957 and that she is a member of Retail Clerks Union Local No. 57. Available information does not indicate that claimant's employment with the Rexall lunch counter was bona fide employment in accordance with Official Interpretation No. 74, dated April 17, 1953.

Available information does not indicate that the parties concerned have used other than peaceful methods for negotiating.

Available information does not indicate that there was failure or refusal of the employer to conform to the provisions of any Law of the State of Montana or of the United States pertaining to collective bargaining, hours, wages, or other conditions of work.

Attached hereto is file labeled "Retail Clerks In-

Exhibit "E"—(Continued)

ternational Association Local Union No. 57, vs. Buttrey Food Stores No. 23, 26, and 28 of Great Falls, Montana."

Conclusion:

Section 87-106 (d) of the Montana Unemployment Compensation Law provides as follows:

"87-106. Disqualification for benefits.

An individual shall be disqualified for benefits—

* * * * *

(d) For any week with respect to which the commission finds that his total unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, or other premises at which he is or was last employed, provided that this subsection shall not apply if it is shown to the satisfaction of the commission that—

"(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

"(2) He does not belong to a grade or class of workers of which immediately before the commencement of the stoppage there were members employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute;

"Provided, that if in any case separate branches of work which are commonly conducted as sepa-

Exhibit "E"—(Continued)

rate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment, or other premises; provided, further, that if the commission upon investigation, shall find that such labor dispute is caused by the failure or refusal of any employer to conform to the provisions of any law of the state wherein the labor dispute occurs or of the United States pertaining to collective bargaining, hours, wages or other conditions of work, such labor dispute shall not render the workers ineligible for benefits."

There can be no question that there was a labor dispute at the following-named establishments:

Matteucci

Super Save

Safeway Stores

Wally's Superette

Noble Mercantile Co.

Southgate Super Save Market

Whitehouse Grocery

Representatives for both the claimants who are members of said Retail Clerks Local No. 57, and the above-named employers, admit that there was a lockout at each of these establishments. A lockout is a form of labor dispute. The total unemployment of the claimants, members of Retail Clerks Local No. 57, last employed at the above-named seven estab-

Exhibit "E"—(Continued)

ishments, was due to a stoppage of work which existed because of the lockout; that each of said claimants was directly interested in said labor dispute which caused the stoppage of work; and, each belongs to the grade and class of workers, of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurred, all of whom were directly interested in the dispute. The Union employed a tactic known generally as "whipsawing" by striking and picketing the premises of one of the members of the Great Falls Employers' Council, Inc., for the purpose of compelling the Council to execute a new contract with the Retail Clerks Local No. 57. The lockout by the employer did not constitute a failure or refusal to conform to the provisions of any law of this state or of the United States pertaining to collective bargaining, hours, wages or other conditions of work. (See *NLRB v. Truck Drivers Local No. 449, et al.*, Supreme Court of the United States, April 1, 1957.)

The Deputy concludes that the claimants mentioned in the above paragraph are disqualified to receive benefits accordingly under Section 87-106 (d) beginning April 14, 1957 through April 25, 1957.

The Deputy concludes that the total unemployment of claimant Mary Hinrichsen, member of Retail Clerks Local No. 57 and employee of Buttreys at the time she filed her claim for benefits was due to a stoppage of work which existed because of a

Exhibit "E"—(Continued)

labor dispute at the establishment or premises at which she was last employed, and at which time she did belong to the grade and class of workers which, immediately before the commencement of the stoppage there were members employed at the premises at which the stoppage occurred, at least some of whom were participating in, or financing, or directly interested in the dispute.

Claimant Mary Hinrichsen is disqualified to receive benefits accordingly under Section 87-106 (d) beginning April 21, 1957 through April 25, 1957.

The Deputy concludes that the total unemployment of the claimants heretofore listed as Meat Cutters and Butchers at the time they filed their claims for benefits was due to a stoppage or work which existed because of a labor dispute at the establishment or premises at which they were last employed, and further, from April 13, 1957 to April 26, 1957, they were participating in the labor dispute by reason of their refusal to cross the picket line established by the Retail Clerks Local Union No. 57.

The aforementioned claimants, members of the Meat Cutters and Butchers Union, are disqualified to receive benefits accordingly under Section 87-106 (d) beginning April 14, 1957 through April 25, 1957.

/s/ CHARLES PETERSON,

Charles Peterson,

Supervising Claims Examiner.

EXHIBIT "H"

[Letterhead of Great Falls Employers'
Council, Inc.]

18 April 1957

Montana State Employment Service
1201 Central Avenue
Great Falls, Montana
Att'n: Mr. P. J. Menager

Re: Labor Dispute, Retail Clerks Local No. 57,
Retail Food Dealers Division, Great Falls Em-
ployers' Council, Inc.

Dear Mr. Menager:

Pursuant to your telephone request, you will find enclosed herewith rosters of all employees involved in the above described labor dispute.

One roster covers all employees of the three (3) stores of Buttrey Foods, Inc. The employees here involved fall into two categories: 1) Retail Clerks who are on strike 2) Butchers and other meat department employees for whom work is available in the local stores of Buttrey Foods, Inc., but who refuse to cross the picket lines of the Clerks and accept such work.

The second roster covers all Retail Clerks employed by Al's Food Market, Matteucci's Super Save Market, Noble Mercantile Co., Safeway Stores, Inc. in its four (4) local stores, Southgate Super Save Market, Wally's Superette and the White House Grocery. These employees were tem-

Exhibit "H"—(Continued)

porarily locked out on Saturday, 13 April 1957, at times varying between 9:00 a.m. and 1:00 p.m.

For your use and information in connection with the second roster, you will also find enclosed, duplicate originals of notices of recall requesting each employee temporarily locked out and who would normally work on Friday, to return to work on Friday, 19 April 1957 at 9:00 a.m. Those employees who would normally work on Saturday only, will be requested by telephone, to return for work on Saturday, 20 April 1957. The originals of the enclosed notices of recall were mailed at 5:00 p.m. on Wednesday, 17 April 1957.

You will note that roster #2 designates each employee with respect to whom we have received a notice of claim for unemployment compensation.

Finally enclosed are copies of each notice of claim for compensation which we have received and a copy of the expired union contract which you may find informative.

On behalf of all employers here involved, we protest the payment of any unemployment compensation on two (2) grounds:

1. The employees have declined to accept work offered to them and there is no evidence that they are not physically or mentally qualified to accept and perform the same.

2. Each of such employees is involved in a work stoppage which exists because of a labor dispute at the establishment where he is employed.

Exhibit "H"—(Continued)

If we may assist you further, please so advise us.

Cordially yours,

GREAT FALLS EMPLOYERS'
COUNCIL, INC.,

/s/ By HOWARD C. BURTON,

Of counsel.

HCB:mal

Encls.

About This Trouble in the Grocery Stores

At the Request of Retail Clerk's Local Union No. 57

AL'S FOOD MARKET
 BUTTREY FOODS, INC.
 MATTEUCCI'S SUPER MARKET
 SOUTHGATE SUPER MARKET
 WALLY'S SUPERETTE
 WHITE HOUSE GROCERY
 NOBLE MERCANTILE CO.

have, since 1951, jointly negotiated and signed ONE common contract. These establishments are, within the meaning of the National Labor Relations Act, "an appropriate, multi-employer bargaining unit," for the purposes of their labor relations, these associated businesses are treated as one.

From February 22 through April 12, these firms bargained with Retail Clerks Local No. 57 in an effort to reach a new agreement, and on the latter date, made the following offer for a two-year contract:

1957-1958		1958-1959	
Increase Hourly Rate		Increase Hourly Rate	
Women	16½¢	\$1.63	10¢
Men	14¢	\$1.97	10¢

STRIKE!

Not satisfied with this offer, on April 13, 1957, the clerks struck the employers' bargaining unit, BUT THEY PICKETED ONLY ONE FIRM—BUTTREY'S. As a defensive measure, all the other stores locked their clerks out.

AL'S FOOD MARKET

BUTTREY FOODS, INC.

WHITE HOUSE GROCERY

MATTEUCCI'S SUPER
 SAVE MARKET

SOUTHGATE SUPER
 SAVE MARKET

If Buttrey Foods, Inc., Is Unfair, We're All Unfair

NOBLE MERCANTILE CO.

SAFEMAY STORES, INC.

WALLY'S SUPERETTE

LOCKOUT

THE SUPREME COURT OF THE UNITED STATES made lockouts as legal as strikes in a decision handed down on Monday, April 1, 1957. The Supreme Court has this to say:

"...the strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the Association with the calculated purpose of causing successive and individual employer capitulations."

"Although the Act (The National Labor Relations Act) protects the right of the employees to strike, in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employers and employees collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union."

DID THE CLERKS FORCE A LOCKOUT?

IN PICKETING ONLY ONE FIRM OF ALL THOSE IN THE EMPLOYERS' BARGAINING UNIT, DID THE CLERKS IN EFFECT NOT FORCE A LOCKOUT?

STRIKE FUND?

SHOULD THE STATE UNEMPLOYMENT COMPENSATION FUND BE A STRIKE FUND?

The State will not pay strikers. Under the law we contend it should not pay employees locked out in these circumstances, for the Unemployment Compensation Law states that compensation "may not be paid to employees interested in or who stand to benefit from a labor dispute."

It is our contention that as conducted the strike attempted to take unfair and illegal advantage of unemployment compensation funds to which as taxpayers we all contribute.



United States of America
Before the National Labor Relations Board

Case No. 19-CA-1459

GREAT FALLS EMPLOYERS' COUNCIL,
INC., RETAIL FOOD DEALERS DIVI-
SION, AND ITS MEMBER EMPLOYERS,
BUTTREY FOODS, INC., SAFEWAY
STORES, INC., PAUL A. MATTEUCCI,
d/b/a MATTEUCCI'S SUPER SAVE MAR-
KET, PAUL A. MATTEUCCI, d/b/a
SOUTHGATE SUPER SAVE MARKET,
JOHN EUSTANCE, d/b/a WHITE HOUSE
GROCERY, ROBERT NOBLE and JOHN
H. NOBLE, d/b/a NOBLE MERCANTILE
COMPANY, E. R. FJELSTAD, d/b/a AL'S
FOOD MARKET, WALLACE ANDERSON,
d/b/a WALLY'S SUPERETTE,

and

RETAIL CLERKS INTERNATIONAL ASSO-
CIATION, LOCAL No. 57, AFL-CIO.

DECISION AND ORDER

I. Statement Of The Case

Upon charges and amended charges timely filed by Retail Clerks International Association, Local No. 57, AFL-CIO (herein called the Union) a complaint was issued herein on October 11, 1957, by the General Counsel of the National Labor Rela-

tions Board, acting through the Regional Director for the Nineteenth Region, alleging that Respondents had engaged in unfair labor practices within the meaning of Sections 8 (a) (1) (3), and (5) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, et seq.), herein called the Act. Upon due service of the charges and amended charges, complaint, and notice of hearing thereon, Respondents filed an answer which admitted many of the allegations in the complaint but denied the commission of any of the unfair labor practices charges. Thereafter, on December 5, 1957, the parties agreed to submit the case to the Board for decision on a complete stipulation of facts which expressly waived hearing before a Trial Examiner and a Trial Examiner's recommended findings of facts, conclusions of law, and order. The Board having authorized such submission of the case and having received and considered briefs filed by the General Counsel, Respondents and Charging Party, hereby finds the facts to be as stipulated. These facts may be summarized as follows:

Respondent Great Falls Employers' Council, Inc., Retail Food Dealers Division (herein called Council), is an employer association and the collective bargaining agent for the 8 members of a multi-employer unit consisting of Respondents Buttrey Foods, Inc.; Safeway Stores, Inc.; Matteucci's Super Save Market; Southgate Super Save Market; White House Grocery; Noble Mercantile Company; Al's Food Market; and Wally's Superette. Respond-

ents admit that they are engaged in commerce within the meaning of Sections 2 (6) and (7) of the Act and the Board, therefore, has jurisdiction of this proceeding. The Union further admits it is a labor organization within the meaning of Section 2 (5) of the Act and, since 1954, the record shows it has been recognized as the exclusive bargaining representative for a unit of Respondents' employees described as follows:

All sales clerks, checkers, grocer or produce clerks, receiving or shipping clerks, stock clerks, order clerks, light parcel delivery men, jumpers, boxout boys, sackers and wrappers of employers of the Retail Food Dealers Division of the Great Falls Employers' Council, excluding supervisory employees as defined in the Act.

On April 22, 1955, the Council and the Union executed a collective bargaining agreement which became effective as of April 1, 1955. Written notice to reopen the contract for negotiations was served by the Union on the Council on January 23, 1957, pursuant to a 60-day automatic renewal clause in the agreement. The Council served a counter notice dated February 8, 1957, on the Union, and on the issues thus framed by notice and counter notice the parties began to bargain on February 22, 1957. During the period February 22, to April 12, 1957, the parties met in seven bargaining sessions, including 3 meetings attended by a conciliator from the Federal Mediation and Conciliation Service. Meanwhile, on March 31, 1957, the contract expired by

its terms,¹ but was continued in effect by mutual agreement of the parties thereto.

On April 12, 1957, the Council submitted, through the conciliator, a "final proposal" which, as slightly amended, was rejected by the Union which, later that evening, voted to strike one employer member, Respondent Buttrey. The Union instructed its employee members that in case of a lockout by the non-struck employer members of the unit, all locked-out employees should register with the Montana Employment Service for other jobs and/or to qualify for unemployment compensation. The Union advised its members that strikers would be, and that those locked out might be, disqualified from receiving benefits because of the existence of a labor dispute.

On the morning of Saturday, April 13, 1957, the Union struck Buttrey by withdrawing its employees and picketing Buttrey's 3 stores. The other Respondents, "prompted by this picketing of this member-employer and to preserve the unity of their position" responded by sending home, thus locking out, all their employees represented by the Union.

¹ Paragraph 19 of the contract provided: A) The provisions of this agreement shall become effective on 1 April 1955 and shall remain in full force and effect through 31 March 1957 and yearly thereafter from 1 April through 31 March unless one of the parties hereto shall serve notice in writing upon the other hereto not less than sixty (60) days prior to expiration date or any anniversary thereafter. If such notice is served by either party hereto, this agreement shall terminate upon its expiration date.

Subsequently Buttrey closed 1 of its 3 stores, and Safeway closed 2 of its 4 stores for the duration of the strike; all other employer-members kept their stores open and operating throughout the strike.

It is stipulated, and the Montana Unemployment Compensation Law provides, that a qualified claimant is entitled to payments of \$32 per week for a period of 22 weeks; however, the claimant will be disqualified for any week in which he has received employment exceeding one eight-hour day and wages exceeding \$15.² Moreover, the Montana statute denies benefits to a claimant whose unemployment is due to a work stoppage caused by a "labor dispute" at the factory, establishment, or other premises at which he was last employed if the claimant is, or belongs to a class of workers any of whom is, participating, financing, or directly interested in the labor dispute, provided: "if the Commission, upon investigation shall find that such labor dispute is caused by the failure or refusal of any employer to conform to the provisions of any law of the state * * * or of the United States pertaining to collective bargaining, hours, wages or other conditions of work, such labor dispute shall not render the workers ineligible for benefits."³

When, on Monday, April 15, 1957, most of the locked-out employees, as urged by the Union, applied to the Montana Unemployment Compensation

² 6 Revised Codes of Montana (1957 Cum. Supp.), § 87-149 (a) (1) (2) and (3).

³ 6 Revised Codes of Montana (1957 Cum. Supp.), § 87-106 (d).

Commission, Respondents forthwith protested to the Commission against any payment of benefits to such employees on the grounds that their unemployment was due to a labor dispute. Respondents, "taking notice of prior decisions" of the Commission and "being advised that a direct protest and definitive appeal would take from weeks to years and that compensation might nevertheless be paid pending the appeal," then admittedly sought effectively to frustrate what they claimed to be "an unprincipled use" of the unemployment fund as a strike fund. Accordingly, Respondents agreed upon the strategy of having each nonstruck employer offer, during each week of the labor dispute, partial reemployment which would last more than one eight-hour shift and would allow each locked-out employee to earn \$16, the minimum weekly amount of work and earnings required by the statute to disqualify a claimant. In so doing Respondents would present the Union and its members with a three-horned dilemma which would have the desired effect no matter which horn was grasped: (1) if the employees accepted, they would be perforce ineligible for unemployment benefits; (2) if they refused individually, they would be similarly disqualified by refusing offered work; (3) if they refused at the request of the Union, they would be strikers and therefore ineligible. At the same time, the Council, by letter dated April 15, 1957, notified the Union that the Council was withdrawing the last offer, which the Union had rejected, and would no longer honor the terms of the old, expired contract except

for such specified exceptions as basic hourly rates of pay without minimum weekly guarantees.

Thereafter, on April 17, 1957, each employer-member, by written notice and telephone, requested its employees to report to work at specified hours on April 19, 1957. When the employees asked the Union for advice, the Union urged them to accept; and when those who accepted⁴ returned to work, their employers candidly told them that the purpose of the reemployment was to circumvent unemployment compensation benefits. On April 20, at various staggered hours, as soon as each recalled employee had earned a total of \$16, he was again released by his employer, except for 2 employer-members, Respondent Al's Food Market and Wally's Superette, which gave their recalled employees full-time work on April 19. On April 20, 1957, the Union delivered to the Council a letter which voiced no objection to the recall on April 19, but stated that it would regard "any further lockout to be an unfair labor practice" under the Act.

During the following week of April 21-27, the Council, as it had before, offered the employees the same amount of work on April 26 and April 27 on the same terms and for the same purpose. There was no further lockout on April 27, however, because on this date the parties concluded a new two-year contract under which the April 26 reemployment became regular.

⁴ Those locked-out employees who had other interim jobs were given the option of returning to Respondents for the limited employment or remaining on their new jobs.

II. The Issues

The complaint alleges that Respondents violated Section 8 (a) (3) and (1) of the Act by locking out the non-striking employees in response to the Union's strike against Buttrey and by the temporary reemployment of these lock-out employees, thus making the lockout intermittent, in order to frustrate any rights they may have had to receive unemployment insurance. The complaint also alleges that Respondents' institution of the partial employment constituted unilateral employer action which violated Section 8 (a) (5) of the Act. Respondents contend, on the other hand, that their lockout action was defensive and therefore lawful under the Board's decision in Buffalo Linen Supply Company;⁵ and that there was no refusal to bargain vis-a-vis the partial employment because the Union acquiesced therein.

III. The Unfair Labor Practices

An employer's right to close down his plant, or to lay off his employees or otherwise to alter his employees' tenure and working conditions, is circumscribed by the Act only insofar as its exercise does not impinge upon the employees' rights to organize and to engage in other concerted activity protected by the Act.⁶ Thus, it is well-settled that an employer is free to suspend operations for business reasons

⁵ 109 NLRB 447, affirmed 353 U. S. 87.

⁶ N. L. R. B. v. Jones & Laughlin, 301 U. S. 1, 45-46.

which are not concerned with protected employees activity.⁷ On the other hand, it is equally settled law that a lockout or layoff prompted, not by business considerations, but by a purpose to defeat organization or other protected activity, is *prima facie* a violation of Section 8 (a) (3) and (1) of the Act.⁸ However, the right of the employees to engage in collective bargaining and to strike in support of their demands is not absolute⁹ and must be balanced against the employer's right to protect his business against unusual economic loss.¹⁰ And, as the Supreme Court has stated, "Accommodation between

⁷ See *N. L. R. B. v. Houston Chronicle Publishing Co.*, 211 F. 2d 848 (C.A. 5); *N. L. R. B. v. Goodyear Footwear Co.*, 186 F. 2d 913, 918 (C.A. 7); *Atlas Underwear Co. v. N. L. R. B.*, 116 F. 2d 1020, 1023 (C.A. 3).

⁸ See *Radio Officers' Union v. N. L. R. B.*, 347 U. S. 17, 44-46; *N.L.R.B. v. Wallick & Schwalm Co.*, 198 F. 2d 477 (C.A. 3); *N. L. R. B. v. Somerset Classics*, 193 F. 2d 613 (C.A. 2), certiorari denied, 344 U. S. 816.

⁹ See *Automobile Workers v. W. E. R. B.*, 336 U. S. 245, in which the Supreme Court observed that (p. 259): "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike * * * [which] because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' * * * recognized as such in its decisions long before it was given protection by the National Labor Relations Act."

¹⁰ *N. L. R. B. v. Babcock & Wilcox Co.*, 351 U. S. 105, 112; *Republic Aviation Corp. v. N. L. R. B.*, 324 U. S. 793, 797-798.

the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.”¹¹

Accordingly, the Board has held that a single employer may counter threatened strikes by lock-outs under circumstances giving special weight to the employer's competing interest.¹² Similarly, the Board has also held that members of a multi-employer unit can resort to a temporary lockout to preserve the unit from the union's tactic of striking only one member of the unit.¹³ Absent such special circumstances, however, an employer, by locking out his employees, presumptively infringes upon the collective bargaining rights of these employees in violation of Section 8 (a) (1) and the resulting layoff not only constitutes unlawful discrimination under Section 8 (a) (3) but also subjects the union

¹¹ *Idem*.

¹² See, e.g., *Duluth Bottling Association*, 48 NLRB 1335, 1359-1360 (where spoilage of employer's material would result otherwise); *International Shoe Co.*, 93 NLRB 907 (where production planning made difficult by prospective recurrent work stoppages); *Betts Cadillac Olds, Inc.*, 96 NLRB 268 (where, because union refused to promise sufficient advance notice of strike, new repair work could not be finished and returned to customers); Cf., *Quaker State Oil Refining Corporation*, 121 NLRB No. 49 (where Board found employer had no reasonable grounds for believing union would call sudden strike which would threaten potentially dangerous plant units). See also, *American Brakeshoe Company*, 116 NLRB 820, set aside, 244 F. 2d 489, (C.A. 7).

¹³ *Buffalo Linen Supply Company*, 109 NLRB 447, affirmed 353 U. S. 87.

and the employees it represents to unwarranted and illegal pressure which creates an atmosphere not conducive to the free opportunity for negotiation contemplated by Section 8 (a) (5).¹⁴ Where such special circumstances are raised as a defense, the burden of going forward with the evidence of justification is upon the employer.¹⁵

1. The original lockout

Applying the foregoing principles to the facts in this case, we agree with Respondents' contention that their original lockout on April 13, 1957, was privileged under our decision in the Buffalo Linen case, *supra*. The parties agree that Respondents' purpose in locking out their non-striking employees was only to protect the multi-employer unit from the disintegration threatened by the Union's tactic of calling a "whipsaw" strike against one employer member in support of demands against all. Such a strike threat "per se, constitutes the type of economic operative problem at the plants of the non-struck employers which legally justifies their resort to a temporary lockout of employees."¹⁶ Respondents' action in this regard was therefore "defensive

¹⁴ Quaker State Oil Refining Corporation, 121 NLRB No. 49; Cf. Insurance Agents International Union (Prudential Insurance Company), 119 NLRB No. 103.

¹⁵ Quaker State Oil Refining Corporation, *supra*.

¹⁶ *N. L. R. B. v. Truck Drivers Union (Buffalo Linen Supply Company)*, 353 U. S. 87, 97.

and privileged in nature, rather than retaliatory and unlawful.”¹⁷

2. The partial lockout

However, we cannot agree with the assertion that the non-struck employers were likewise privileged, under the principle announced in the Buffalo Linen case, *supra*, to rehire their locked-out employees on April 19, 1957, and again to lay them off on the next day as soon as each had earned \$16. In so doing these Respondents were not seeking to protect their legitimate interest in bargaining on a group basis; indeed, by voluntarily breaking their own lawful lockout they demonstrated that they did not believe the multi-employer unit was then in any danger from the Union's strike action. This conduct was not defensive in nature, but instead, was patently in retaliation against the concerted, union-directed efforts of these employees to procure unemployment insurance benefits pending settlement of the labor dispute.¹⁸ In short, having demanded and received the right to lockout to protect the unit,

¹⁷ *Idem*.

¹⁸ The record as a whole does not support an inference that the Union and its members were thus engaged in an unprotected “unlawful conspiracy” to finance the strike out of state funds. These claimants had an undoubted right to apply for benefits even though the State Unemployment Compensation Commission might reject their applications as unmeritorious, as the Commission did in fact. Legal conduct is not made illegal, and thus unprotected, because it is concerted. *Automobile Workers v. W. E. R. B.*, 336 U. S. 245, 258.

Respondents now demand the right to engage in a partial lockout upon a profession of their desire to protect the unemployment reserves of the State of Montana from a real or fancied misuse as a strike fund. On the record here, we find no warrant in law, equity, or reason for such an extension of the holding in the Buffalo Linen case.

Respondents' contention that there are special circumstances which justify their action turns upon certain provisions of the law of Montana. The Montana unemployment compensation statute,¹⁹ in addition to denying benefits to a claimant for any week in which he has received employment exceeding one eight-hour day and wages exceeding \$15, also, in another section thereof,²⁰ denies benefits if the claimant's "unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment, at other premises at which he is or was last employed;" provided, the Montana Unemployment Compensation Commission finds that the claimant is participating in or financing or directly interested in the labor dispute causing the work stoppage, or is a member of a grade or class of workers so involved in the dispute; provided further, that the Commission finds the labor dispute is not caused by an employer unfair labor practice under either state or federal law.²¹ The statute is

¹⁹ 6 Revised Codes of Montana (1957 Cum. Supp.) § 87-149 (a).

²⁰ 6 Revised Codes of Montana (1957 Cum. Supp.) § 87-106 (d).

²¹ *Idem*.

silent as to whether or not a "lockout" comes within the term "labor dispute." However, Respondents assert in their brief that the Commission had held in a prior uncited case, that employees locked out under the circumstances of this case were not unemployed because of a "labor dispute," a result Respondents considered contrary to the state public policy underlying enactment of the Statute.²² Therefore, Respondents contend that unless they took direct action to disqualify these employees under one section of the law, they believed the Commission would reject their direct protest,²³ misconstrue the "labor dispute" section and order payment before this order could be litigated to a conclusion in the state courts, the net result of which would be to increase these employers' tax contributions to the unemployment reserves under the state's experience rating formula, thus compelling them to subsidize the Union's strike against themselves. But assuming, arguendo, that such are the consequences, we

²² See 6 Revised Codes of Montana (1947), § 87-108: "The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure under the police powers of the state for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own."

²³ In fact, however, the record shows that the Commission sustained Respondents' protest, concluding that the "lockout" in question was a "labor dispute" within the meaning of the statute and was not an unfair labor practice under state or federal law on the basis of the Supreme Court's decision in the Buffalo Linen case, *supra*.

do not think they constitute those special circumstances which the Board has held, in other cases, entitle an employer to lockout in order to protect his business from unusual economic loss.²⁴

Moreover, if we were to conclude that Respondents' lockout technique is justified because, as our dissenting colleagues argue, the resulting disqualification of locked-out employees complements local public policy forbidding payment of unemployment insurance benefits to such claimants, the Board, by parity of reasoning, would presumably find no justification and therefore a violation, in other cases arising in other states where this action is repeated, not to support, but to circumvent public policies which, to the contrary, allow such benefits.²⁵ Thus in future cases of this type, the Board would be under a self-imposed burden to make an initial inquiry into and perhaps construe originally, the various applicable state statutes. The Board's power to find and to remedy unfair labor practices ought not to "hinge on the myriad provisions of state unem-

²⁴ See cases at ftn. 12, *supra*.

²⁵ See e.g.: Purdon's Penna. Stat. Ann., Tit. 43 § 802 (d) and Minn. Stat. Ann. § 268.09 1 (b), which expressly exempt from disqualification those unemployed because of a lockout. Thus the Pennsylvania statute has been held constitutionally to pay benefits to strikers (*Boyertown Burial Casket Co. v. Commonwealth*, 79 A. 2d 449); and the Minnesota statute has been construed so as to make eligible those employees locked out by members of a multiemployer unit in response to the union's strike against two other members of the unit (*Bucko v. J. F. Quest Foundry Co.*, 38 N. W. 2d 223, 235).

ployment compensation laws.”²⁶ For, as the Supreme Court had held in a slightly different context but in language we think applicable here,²⁷ “any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state [unemployment compensation] law, designed to effectuate a public policy with which it is not the Board’s function to concern itself.”

Thus we hold on the facts of this case that Respondents’ action in locking out their recalled employees on April 20, 1957, was a manipulation of tenure and terms of employment which infringed upon the collective bargaining rights of these employees and tended to discourage support of the Union and concerted activity for mutual aid or protection in violation of Section 8 (a) (3) and (1) of the Act. Where, as here, the discrimination had the natural tendency to discourage union membership or activity, specific evidence of anti-union animus and intent to cause such discouragement is not a prerequisite to finding a Section 8 (a) (3) violation, as Respondents contend.²⁸ This is nothing more than an application of the familiar common law rule which holds a man accountable for the foreseeable consequences of his own conduct.²⁹

²⁶ Cf. *Gullet Gin Company v. N. L. R. B.*, 340 U. S. 361, 365.

²⁷ *Idem.*

²⁸ *Rockaway News Supply Company, Inc.*, 94 NLRB 1056, 1059 and cases there cited.

²⁹ *Radio Officers’ Union v. N. L. R. B.*, 347 U.S. 17, 45.

3. Renunciation of prior bargaining commitments

The record shows, as we so find, that beginning on February 22, 1957, Respondents bargained in good faith until an impasse developed on April 12, 1957, when the Union rejected Respondents' last amended offer and, on the following day, struck Buttrey, one member of the multi-employer unit. Thereafter, Respondents were relieved of any duty they may have been under to adhere to previously-made bargaining concessions and were free to withdraw, as they did on April 15, 1957, their rejected "final proposal" and to renounce the terms of the old, expired contract which had been continued in effect by mutual consent of both parties thereto.³⁰ Accordingly, we hold that, contrary to the General Counsel's contention, Respondent did not thereby refuse to bargain in good faith within the meaning of Section 8 (a) (5).

4. Unilateral action

Following a bona fide impasse such as occurred in this case, the obligation of the Employer to resume negotiations is dependent upon a bona fide request therefor, provided that such further negotia-

³⁰ Celanese Corporation of America, 95 NLRB 664, 665 (ftn. 1). See also Clinton Foods Inc., 112 NLRB 239, 262-263; Fehr Baking Company, 104 NLRB 241, 245.

tions would not be clearly futile.³¹ This does not mean, however, as Respondents apparently argue, that they were free, following the impasse and in absence of a union request to bargain, unilaterally to institute partial reemployment. This contention ignores the fact that the impasse was followed by the Union's protected strike action against Buttrey, in which event the duty to bargain continued.³² Indeed, as the Court of Appeals for the Second Circuit has held, "the need for carrying out that obligation when a strike is in progress is all the greater in order that a peaceful settlement of the dispute may be reached."³³

³¹ *Jefferson Standard Broadcasting Company*, 94 NLRB 1507, 1515, *aff'd sub nom* 346 U. S. 464. *Accord*: *N. L. R. B. v. Sands Mfg. Co.*, 306 U. S. 332, 343-344, holding that after a good faith impasse the burden of renewing negotiations is upon the employees.

³² *Amalgamated Association v. W. E. R. B.*, 340 U. S. 383, 398-399; *Lion Oil Co. v. N. L. R. B.*, 352 U. S. 282. The strike here against one member of the multi-employer unit is a permissible economic weapon under the Act. *Morand Bros. Beverage Co. v. N. L. R. B.*, 190 F. 2d 576, 582 (C.A. 7); Section 13 of the Act. It is, therefore, to be distinguished from a partial unprotected strike against a single employer which suspends the employer's duty to bargain and leaves him free to resort to such self help as discharging or locking out the employees while they are engaged in such activity. See e.g., *Textile Workers Union of America, CIO (Personal Products)*, 108 NLRB 743; *Valley City Furniture Co.*, 110 NLRB 1586, *enf'd* 230 F. 2d 947 (C.A. 6); *Pacific Telephone and Telegraph Company*, 107 NLRB 1507.

³³ *N. L. R. B. v. Pecher Lozenge Co.*, 209 F. 2d 393, 403 (C.A. 2).

If Respondents were under a duty to bargain with the Union about the partial reemployment, and we have held they were, this obligation was not met by merely notifying the Union that the terms of the old contract would no longer apply and then offering the specific new terms directly to the employees. As the Supreme Court has stated,³⁴ “[E]mployer action to bring about changes in wage scales without consultation and negotiation with the certified representative of its employees cannot logically or realistically be distinguished from bargaining with individuals or minorities * * * Such unilateral action * * * interferes with the rights of self-organization by emphasizing that there is no necessity for a collective bargaining agent.” No bargaining on the question of partial reemployment had taken place, and thus there could be no bargaining impasse which would alone have entitled the employers unilaterally to institute terms which had previously been proposed to and rejected by the Union.³⁵

However, where, as here, the union acquiesces in the unilateral employer action, the Board has held that such unilateral conduct does not constitute a refusal to bargain.³⁶ In this regard, the record shows that Respondents, by letter dated April 15,

³⁴ *May Stores Co. v. N. L. R. B.*, 326 U. S. 376, 384.

³⁵ See *N. L. R. B. v. Crompton-Highland Mills, Inc.*, 337 U. S. 217, 224-225.

³⁶ *Mitchell Plastics, Inc.*, 117 NLRB 597, enforced 42 LRRM 2028 (C.A. 6); *Frohman Manufacturing Co., Inc.*, 107 NLRB 1308.

advised the Union that Respondents thereby withdrew assent to the terms of the old, expired contract and thereafter, on April 17, issued written notice of recall to the locked-out employees to return to work on April 19, 1957, at specified hours. This reemployment, it is stipulated, was offered under the terms and conditions set forth in the April 15 letter to the Union the effect of which, inter alia, was to eliminate any guaranteed minimum hours per work week or day. It is therefore reasonable to infer that, although no employees represented by the Union were then working, they having been previously locked out, this letter to the Union carried with it implied notice that if these employees did work, they would be required to work under the revised terms and conditions. Moreover, it is further stipulated that these employees, before accepting this work, sought the Union's advice; and that when they returned to their old jobs, as requested by the Union, Respondents then candidly told them the purpose of the partial reemployment. Thus, the Union was fully apprised of Respondents unilateral action, declined to request bargaining about this matter and acquiesced therein by expressly instructing the employees to accept. Accordingly, such conduct was therefore not a refusal to bargain under Section 8 (a) (5) of the Act.

IV. The Remedy

The activities of the Respondents set forth above under the heading, III. The unfair labor Practices, 2. The partial lockout, occurring in connec-

tion with the operation of the Respondents described above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof. Therefore, the Board, having found that Respondents have engaged in certain unfair labor practices, shall order that Respondents cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. The Respondents, Great Falls Employers Council, Inc., Retail Food Dealers Division, and its member employers, are engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Retail Clerks International Association, Local No. 57, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By discriminating in regard to the tenure and terms of employment of employees, thereby discouraging membership in and support of the Union and concerted activity for mutual aid or protection, the Respondents have engaged in unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. By such discrimination, the Respondents have interfered with, restrained, and coerced their employees in the exercise of rights guaranteed in Section 7 of the Act and have thereby engaged in un-

fair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

6. The Respondents have not engaged in unfair labor practices within the meaning of Section 8 (a) (5) of the Act.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders:

I. That the complaint in this case in so far as it alleges that the Respondents herein engaged in unfair labor practices within the meaning of Section 8 (a) (5) of the Act be, and it hereby is dismissed.

II. That the Respondents, their officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging membership in the Retail Clerks International Association, Local No. 57, AFL-CIO, or any other labor organization of its employees, by discriminatorily locking out, laying off, or reducing the work week of its employees, or by discriminating in any other manner in regard to their hire or tenure of employment or any term or condition of employment, except to the extent permitted in Section 8 (a) (3) of the Act;

(b) In any like or related manner interfering

with, restraining, or coercing their employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Make whole all employees whose names are listed in Appendix A, attached hereto, for any loss of pay they may have suffered by reason of the discrimination by paying to each such employee a sum of money equal to that amount he would normally have earned during the period from April 19, 1957 to April 26, 1957, inclusive, less his net earnings during such period.

(b) Post in their respective Great Falls, Montana, stores, copies of the notice attached hereto as Appendix B.³⁷ Copies of said notice, to be furnished

³⁷ In the event that this Order is enforced by a decree of the United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondents' representatives, be posted by Respondents immediately upon receipt thereof, and be maintained by them for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material;

(c) Preserve and make available to the Board or its agents upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze and compute the amount of back pay due under the terms of this Order;

(d) Notify the said Regional Director for the Nineteenth Region, in writing, within ten (10) days from the date of this Order as to what steps have been taken to comply herewith.

Dated, Washington, D. C., April 29, 1959.

BOYD LEEDOM, Chairman,
STEPHEN S. BEAN, Member,
JOHN H. FANNING, Member,

[Seal] National Labor Relations Board.

Members Philip Ray Rodgers and Joseph Alton Jenkins, concurring in part and dissenting in part:

We agree with the majority that under the

Board's Buffalo Linen doctrine, as approved by the Supreme Court,³⁸ the nonstruck employer members in the unit lawfully locked out their employees in response to the Union's tactic of calling a "whipsaw" strike against one member of the unit in support of bargaining demands against all. We also agree that these Respondents' unilateral action in offering their employees enough work presumably to disqualify them from receiving unemployment insurance, thus reducing the lockout to one that was partial, was not a refusal to bargain under Section 8 (a) (5) of the Act because the Union acquiesced therein by instructing its members to return to work on the new terms. However, we cannot conclude as does the majority that, on the stipulated facts in this case, the layoff inherent in the partial lockout was a violation of Section 8 (a) (3) and (1) of the Act and would, therefore, dismiss the complaint in its entirety.

On this aspect of the case, we cannot subscribe to the rationale implied in the majority's decision, that Respondents were strangers to the Montana unemployment fund and had no standing to protect it from misuse as a union strike fund. On the contrary, unemployment compensation payments are made to qualified employees by the states out of funds derived wholly from employer tax contributions thereto and are designed to carry out a policy

³⁸ *N. L. R. B. v. Truck Drivers Union (Buffalo Linen Supply Company)*, 313 U.S. 87, affirming 109 NLRB 447.

of social betterment for the entire state.³⁹ Furthermore the state courts have held that it is therefore not only a contributor's right but his duty to see that the "purpose and full integrity" of the fund is preserved.⁴⁰ Accordingly, the Respondents herein, as contributors, were under a primary duty to preserve the Montana fund for the benefit of the class of employees preferred by the statute,⁴¹ i.e., those "persons unemployed through no fault of their own," and to resist depletion of the fund by ultra vires payments to those whose unemployment was voluntary and in fact caused by a labor dispute (i.e., a lockout) deliberately precipitated and anticipated by the Union when it ordered the strike against Buttrey.

Moreover, the Respondents had an economic interest in the impact which such disbursements would have on their future liability under the state statute. Instead of requiring all employers to contribute a uniform percentage of their payrolls to unemployment compensation funds, all states now use some type of sliding scale based upon the individual employer's unemployment experience.⁴² Un-

³⁹ *Gullet Gin v. N. L. R. B.*, 340 U.S. 361, 364; see also *Local 1400 (Pardee Construction)*, 115 NLRB 126, 129.

⁴⁰ *Chrysler Corp. v. Smith*, 297 Mich. 438, 298 N.W. 87, 92-93. See also *Tube Reducing Corp. v. Unemployment Comp. Com'n.*, I.N.J. 177, 62 A. 2d 473, 475.

⁴¹ 6 Revised Codes of Montana (1947), § 87-102.

⁴² See *Larson & Murray, The Development of Unemployment Insurance in the United States*, 8 Vand. L. Rev. 181, 205 (1955).

der the "reserve-ratio" plan, the experience rating device apparently used by Montana and about 32 other states, memorandum accounts are created for each employer.⁴³ Since a state's allowance of benefits to employees is charged to their employer's memorandum account, which is the most significant factor in computing his contribution ratio, the employer's economic interest therein becomes real.⁴⁴ Thus, such agency allowance of benefits as Respondents in this case sought to circumvent places the employer in the anomalous position of supporting, through his own contributions, workers on strike against him.⁴⁵

⁴³ See Temple S. Novack, *Experience Rating: Its Objections, Problems and Economic Implications*, 8 Vand. L. Rev. 376, 391 (1955).

⁴⁴ *Pennsylvania Chamber of Commerce v. Jorquato*, 386 Pa. 306, 125 2d 755; 6 Revised Codes of Montana (1957) Cum. Supp., § 87-107 (d).

⁴⁵ Cf. *Tube Reducing Corp. v. Unemployment Comp. Com'n.*, I.N.J. 177, 182, 62A. 2d. 473, 475, in which the court stated:

The policy of denying access to the fund as a means of sustenance to those unemployed because of participation in a labor dispute is outstanding; and it would seem to be axiomatic that the employer also has a special interest sufficient to justify his interposition to prevent the use of the fund, created to relieve unemployment that is in fact involuntary, and made up in substantial part by his contributions * * * for the advancement of the interest of the adversary parties to the labor dispute, and so to preclude misuse of the fund constituting in effect governmental intervention in aid of a party to a labor dispute in violation of the clear legislative policy.

The mere fact that a union representing all the employees in a multi-employer unit chooses, as in this case, to strike only one member of the unit, instead of all, warrants an inference that it is out to undermine the employers' collectivism for mutual aid and protection which is the fundamental aim of bargaining on a group basis. This technique, if successful, permits the union to avoid the economic hardships of a full-blown strike, because it then has only a relatively few members dependent upon its treasury for sustenance and a host of others still at work in the nonstruck plants who can support, through their earnings, their fellow employees who have sacrificed their wages and lent their ebullience to picketing the struck plant. However, since our decision in the Buffalo Linen case, the nonstruck employers are no longer required thus to underwrite the effectiveness of the union's strike and may, by locking out their employees, subject them to the same economic pressures felt by the strikers.

Thus, the record shows that the nonstruck Respondents originally locked out their employees and thereby regained that equality of collective bargaining power to which they are entitled under the Act. These were the rights—including the right to make the lawful lockout effective—which the state action threatened to diminish. For, if, as the evidence here clearly shows Respondents had good reason to fear, the commission should sustain the locked-out employees' applications for unemployment compensation and order immediate payment of \$32 per week

to each claimant out of funds exacted, in part, from these very employers, this state intervention would not only tend to undermine the effectiveness of the lockout but also would literally compel these employers to do indirectly what they had just rightfully refused to do directly, i.e., to subsidize their workers' strike action. It is therefore a manifest absurdity to say, as does the majority, that Respondents, by recalling these employees for \$16 worth of work and again laying them off for the purpose of disqualifying them under the state unemployment compensation statute, were "not seeking to protect their legitimate interest in bargaining on a group basis." Indeed, this action was calculated to, and did, protect the unit by preserving for the Respondents the quiet enjoyment of other rights in the Buffalo Linen case.

We find no warrant in the law for holding, as does the majority, that the Respondents, under the circumstances of this case, must view with equanimity the prospect of the state, presumably committed to a position of neutrality in labor disputes, about to place its thumb upon the Union's side of the scales. If, under the Act which we administer, the Union can resort to a state law for a collateral benefit which upsets the balanced bargained relationship contemplated by the Act, then even-handed justice requires that the employer also be allowed to resort to self-help consistent with local law in order to restore a partial status quo. Faced with a "Hobson's choice," the nonstruck employers did no more than to pay each of those employees

who accepted their offer wages of \$16 per week for services rendered instead of indirectly subsidizing him to the extent of \$32 for striking. As the Supreme Court has admonished the Board,⁴⁶ "Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."⁴⁷ The decision here falls quite wide of that mark.

Dated, Washington, D. C., April 29, 1959.

PHILIP RAY RODGERS, Member,
JOSEPH ALTON JENKINS, Member,
National Labor Relations Board.

⁴⁶ *Southern S.S. Co. v. N. L. R. B.*, 316 U.S. 31, 47.

⁴⁷ *Gullet Gin v. N. L. R. B.*, 340 U.S. 361, 364, relied upon by the Board, is not to the contrary. In *Gullet Gin*, the Supreme Court merely held that the Board's discretion was not abused by excluding unemployment insurance benefits from interim earnings in computing a discriminatee's back pay award.

APPENDIX "A"

Listed below under the names of the respective Respondents are the names of the employees who were discriminatorily laid off by said Respondents on April 20, 1957, and permanently reinstated on April 26, 1957, in accordance with the terms of the new contract.

Safeway Stores, Inc.

Store #1855—Central Avenue

Fate Brewer, Jr.	*Ben Peterson
Glenn Bridgeforth	Helen Pittman
*Richard Konesky	Billy B. Young
*Leonard Moyer	

Safeway #1856—North

Arlene Bauer	Neil J. McRorie
Margaret Clausen	*Stanley A. Marko
*Robert A. Dull	Patrick Lyons
Jean Hallan	*Aaron Peterson
Richard L. Hamers	*David S. Scott
Lydell Jurasek	*John Scott
Phil A. Keller	Grace Simonton
Cecelia Krall	*Joseph Super
June M. Leiby	Lionel Swanson, Jr.
Jack McConnel	Alice Lonnaine Tenney

Safeway #1857—West Side

Rose Marie Andrews	Arthur L. Raunig, Jr.
Marion R. Crawford	Dorothy K. Rio
Herbert F. Hart	Freedra Rosbarsky
Patrick O'Connell	Donna J. Sanders
Peder G. Pederson	*Frank Searl
Joyce Ann Perrigo	Margaret Tempel
*William Puzon	Leah Walbon

Safeway #1865—Southeast

Louise Armstrong	Irmen L. D. Knerr
Helen M. Axtman	Nettie Korin
Verna Brown	Alvin Ladd
*Charles Bundi	Peter K. Meras
Dolores Daniels	*Dan Meyer
Charlotte Goldberg	Joseph Meyer
Jack Itami	Paul Pfeifle
Frances E. Kelly	

Paul A. Matteucci, d/b/a Matteucci's Super Save Market

Verlyn Brown	Irene I. Major
Joseph Chambers	Thomas S. Marshall
*Lorrin A. Darby	*Jerry Mitchell
*Gayle Garrity	Doris Paulson
*Richard Gasvoda	*Donn Peterson
Charlene Gleason	George F. Potts
Everett W. Greenbush	Robert E. Purcell
Patsy A. Holmes	Dewain D. Ryan
*Arlee Javner	Darrell D. Schwen
Gertrude Kendall	Daryl A. Soltesz
*Barbara Koesler	Leonard J. Weaving
Doris Madison	*Stuart Wilson

Paul A. Matteucci, d/b/a Southgate Super Save Market

Madlee Anderson	Lucille Habel
Helen M. Burns	*Tony Kraft
Helen P. Gabbert	*Ken Roeben, Jr.

* These employees were not "regular" employees, but were "call in" or "student" employees who had worked on an intermittent basis and whose employment during the period of April 20 to April 26, 1957, was less than their part-time work.

Paul A. Matteucci, d/b/a Southgate Super Save
Market—(Continued)

Robert C. Gill	Stanley L. Timms
Wilford G. Smith	Helen Wheeler

John Eustance, d/b/a White House Grocery

Joett E. Aman	Laurence Love
Rose Cadieux	Georgia Vining
Harry Kimmerle	

Robert Noble and John H. Noble, d/b/a/ Noble
Mercantile Company

William Gosney	Alta Kopetski
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APPENDIX "B"

Notice to All Employees: Pursuant to a Decision and Order of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

We Will Not discourage membership in Retail Clerks International Association, Local No. 57, AFL-CIO, or in any other organization of our employees, by discriminatorily locking out, laying off, or reducing the work week of, our employees, or by discriminating in any other manner in regard to

their hire or tenure of employment or any term or condition of employment.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the right of self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will make whole all employees named in the attached list for any loss of pay they may have suffered as a result of our discrimination practiced against them.

All our employees are free to become, remain, or to refrain from becoming or remaining, members of the above-named labor organizations or any other labor organization, except to the extent that such right may be affected by an agreement authorized by Section 8 (a) (3) of the Act.

Great Falls Employers' Council, Inc.
Retail Food Dealers Division

Dated.....

By
(Representative) (Title)
Safeway Stores, Inc.

By
(Representative) (Title)
Paul A. Matteucci, d/b/a Matteucci's
Super Save Market

By
(Representative) (Title)
John Eustance, d/b/a White House
Grocery

By
(Representative) (Title)
Paul A. Matteucci, d/b/a Southgate Super
Save Market

By
(Representative) (Title)
Robert Noble and John H. Noble, d/b/a
Noble Mercantile Company

By
(Representative) (Title)
E. R. Fjelstad, d/b/a Al's Food Market

By
(Representative) (Title)
Wallace Anderson, d/b/a/ Wally's
Superette

By
(Representative) (Title)
Buttrey Foods, Inc.

By
(Representative) (Title)

Dated.....

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

ORDER CORRECTING DECISION
AND ORDER

On April 29, 1959, the Board issued a Decision and Order¹ in the above entitled proceeding.

It Is Hereby Ordered that the said Decision and Order be, and it hereby is, corrected by deleting from page ii of Appendix A the following:

E. R. Fjelstad, d/b/a Al's Food Market
Lucille Sowa

Wallace Anderson, d/b/a Wally's Superette
Lester Oswald

It Is Further Ordered that the said Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., July 9, 1959.

By direction of the Board:

OGDEN W. FIELDS,
Acting Executive Secretary.

¹ 123 NLRB No. 109.

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

GREAT FALLS EMPLOYERS' COUNCIL, INC.,
RETAIL FOOD DEALERS DIVISION,
AND ITS MEMBER EMPLOYERS, BUT-
TREY FOODS, INC., SAFEWAY STORES,
INC., PAUL A. MATTEUCCI, d/b/a MAT-
TEUCCI'S SUPER SAVE MARKET, PAUL
A. MATTEUCCI, d/b/a SOUTHGATE SU-
PER SAVE MARKET, JOHN EUSTANCE,
d/b/a WHITE HOUSE GROCERY, ROB-
ERT NOBLE and JOHN H. NOBLE, d/b/a
NOBLE MERCANTILE COMPANY, E. R.
FJELSTAD, d/b/a AL'S FOOD MARKET,
WALLACE ANDERSON, d/b/a WALLY'S
SUPERETTE, Respondents.

CERTIFICATE OF THE NATIONAL LABOR
RELATIONS BOARD

The National Labor Relations Board, by its Ex-
ecutive Secretary, duly authorized by Section
102.92, Rules and Regulations of the National La-
bor Relations Board—Series 7, hereby certifies that
the documents annexed hereto constitute a full and
accurate transcript of the entire record of a pro-
ceeding had before said Board and known upon its

records as Case No. 19-CA-1459. Such record includes the pleadings and stipulation upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Copies of charge, amended charges, complaint and notice of hearing and Respondents' answer to complaint, with exhibits A thru E attached.

2. Stipulation dated December 5, 1957, among General Counsel, Respondents and Charging Party, waiving hearing before a Trial Examiner, and making of findings of fact and conclusions of law and issuance of an Intermediate Report and Recommended Order, with exhibits F thru N attached.

3. Order approving stipulation and transferring case to the Board, dated January 24, 1958.

4. Copy of Decision and Order issued by the National Labor Relations Board on April 29, 1959.

5. Copy of Order correcting Decision and Order issued by the National Labor Relations Board on July 9, 1959.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington,

District of Columbia, this 15th day of September,
1959.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 16565. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Great Falls Employers' Council, Inc., et al., Respondents. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed September 16, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16565

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

GREAT FALLS EMPLOYERS' COUNCIL, INC.,
RETAIL FOOD DEALERS DIVISION,
AND ITS MEMBER EMPLOYERS, BUT-
TREY FOODS, INC., SAFEWAY STORES,
INC., PAUL A. MATTEUCCI, d/b/a MAT-
TEUCCI'S SUPER SAVE MARKET, PAUL
A. MATTEUCCI, d/b/a SOUTHGATE SU-
PER SAVE MARKET, JOHN EUSTANCE,
d/b/a WHITE HOUSE GROCERY, ROB-
ERT NOBLE and JOHN H. NOBLE, d/b/a
NOBLE MERCANTILE COMPANY, E. R.
FJELSTAD, d/b/a AL'S FOOD MARKET,
WALLACE ANDERSON, d/b/a WALLY'S
SUPERETTE, Respondents,

PETITION FOR ENFORCEMENT OF AN OR-
DER OF THE NATIONAL LABOR RELA-
TIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to
the National Labor Relations Act, as amended (61
Stat. 136, 29 U. S. C., Secs. 151, et seq., as amended

by 72 Stat. 945), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order dated April 29, 1959, and Order Correcting Decision and Order, dated July 9, 1959, against Respondents, their officers, agents, successors and assigns, Case No. 19-CA-1459.

In support of this petition the Board respectfully shows:

(1) Great Falls Employers' Council, Inc., Retail Food Dealers Division (hereinafter called Division) is an Employer Association of the eight member-employers engaged in business in the State of Montana within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 29, 1959, upon stipulation of agreed facts, issued an Order directed to the Respondents, their officers, agents, successors and assigns. Thereafter, on July 9, 1959, the Board issued an Order correcting Decision and Order. On their respective dates, the Board's Decision and Order and Order Correcting Decision and Order were served upon Respondents by sending copies thereof postpaid, bearing Government frank by registered mail, to Respondents' counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript

of the entire record of the proceeding before the Board upon which said orders were entered, which transcript includes the pleadings, stipulation of facts and the Orders of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondents and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Orders made thereupon a decree enforcing in whole said Orders of the Board, and requiring Respondents, their officers, agents, successors and assigns, to comply therewith.

Dated at Washington, D. C., this 5th day of August, 1959.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel, Na-
tional Labor Relations Board.

[Endorsed]: Filed August 7, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ANSWER OF RESPONDENTS TO PETITION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS
BOARD

To the Honorable Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The Respondents above named respectfully resist the petition of the National Labor Relations Board submitted pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq., as amended by 72 Stat. 945), hereinafter called the Act, for the enforcement of its order dated 29 April 1959 and Order Correcting Decision and Order dated 9 July 1959 and issued in Case No. 19-CA-1459.

By way of answer to the petition of the Board and in support of their resistance to the relief sought thereby, Respondents respectfully state that:

1. They admit the matters demonstrated in paragraphs one (1), two (2) and three (3) of the Board's petition for enforcement.

2. Notwithstanding such admissions, the Board is not entitled to the decree of this Court enforcing any portion of the said Orders of the Board in that:

- A) The Board erred in its interpretation of the facts and in reaching the conclusion set forth in its decision that " * * * Respondents' action in locking out their recalled employees on April 20, 1957,

was a manipulation of tenure and terms of employment which infringed upon the collective bargaining rights of these employees and tended to discourage support of the Union and concerted activity for mutual aid or protection in violation of Section 8 (a) (3) and (1) of the Act. Where, as here, the discrimination had the natural tendency to discourage union membership or activity, specific evidence of anti-union animus and intent to cause such discouragement is not a prerequisite to finding a Section 8 (a) (3) violation, as Respondents contend. This is nothing more than an application of the familiar common law rule which holds a man accountable for the foreseeable consequences of his own conduct." (Decision and Order, Heading III Paragraph 2, pages 10 and 11.)

B) The Board erred in its interpretation of the law and in reaching the conclusions set forth with respect thereto in that portion of its Decision and Order entitled "Conclusions of Law", as follows:

"3. By discriminating in regard to the tenure and terms of employment of employees, thereby discouraging membership in and support of the Union and concerted activity for mutual aid or protection; the Respondents have engaged in unfair labor practices within the meaning of Section 8 (a) (3) of the Act."

"4. By such discrimination, the Respondents have interfered with, restrained, and coerced their employees in the exercise of rights guaranteed in Section 7 of the Act and have thereby engaged in

unfair labor practices within the meaning of Section 8 (a) (1) of the Act.”

“5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.” (Decision and Order page 14.)

C) The affirmative action prescribed as a remedy by the Board is not designed to effectuate the policies of the Act, when considered in the light of the Board's finding that the parties concluded a new two-year contract under which re-employment became regular, when considered in the light of the motives of both Respondents and Retail Clerks International Association Local No. 57, AFL-CIO, in pursuing their respective courses of conduct during the labor dispute, and when considered in the light of the manner in which this cause was submitted.

Respondents therefore pray that the petition of the Board be dismissed.

Dated at Great Falls, Montana, 26 August 1959.

/s/ HOWARD C. BURTON,
Attorney for Respondents.

[Endorsed]: Filed August 27, 1959. Paul P. O'Brien, Clerk.

No. 16565

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT FALLS EMPLOYERS' COUNCIL, INC., RETAIL FOOD DEALERS DIVISION, AND ITS MEMBER EMPLOYERS, BUTTREY FOODS, INC., SAFEWAY STORES, INC., PAUL A. MATTEUCCI, D/B/A MATTEUCCI'S SUPER SAVE MARKET, PAUL A. MATTEUCCI, D/B/A SOUTHGATE SUPER SAVE MARKET, JOHN EUSTANCE, D/B/A WHITE HOUSE GROCERY, ROBERT NOBLE AND JOHN H. NOBLE, D/B/A NOBLE MERCANTILE COMPANY, E. R. FJELSTAD, D/B/A AL'S FOOD MARKET, AND WALLACE ANDERSON, D/B/A WALLY'S SUPERETTE, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,

General Counsel,

THOMAS J. McDERMOTT,

Associate General Counsel,

MARCEL MALLET-PREVOST,

Assistant General Counsel,

FANNIE M. BOYLS,

STANDAU E. WEINBRECHT,

Attorneys,

National Labor Relations Board.

FILED

JAN - 4 1965

AUL P. O'BRIEN, CLERK

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In the United States Court of Appeals for the Ninth Circuit

No. 16565

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GREAT FALLS EMPLOYERS' COUNCIL, INC., RETAIL FOOD DEALERS DIVISION, AND ITS MEMBER EMPLOYERS, BUTTREY FOODS, INC., SAFEWAY STORES, INC., PAUL A. MATTEUCCI, D/B/A MATTEUCCI'S SUPER SAVE MARKET, PAUL A. MATTEUCCI, D/B/A SOUTHGATE SUPER SAVE MARKET, JOHN EUSTANCE, D/B/A WHITE HOUSE GROCERY, ROBERT NOBLE AND JOHN H. NOBLE, D/B/A NOBLE MERCANTILE COMPANY, E. R. FJELSTAD, D/B/A AL'S FOOD MARKET, AND WALLACE ANDERSON, D/B/A WALLY'S SUPERETTE, RESPONDENTS

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order (R. 92-94) ¹ issued against respondents on

¹ References to the printed record are designated "R." References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence.

April 29, 1959, following proceedings pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 72 Stat. 945, 29 U.S.C., Sec. 151, *et seq.*), hereinafter called the Act.² The Board's Decision and Order (R. 71-106) are reported in 123 NLRB No. 109. This Court has jurisdiction of these proceedings under Section 10(e) of the Act, the unfair labor practices having occurred in Great Falls, Montana, within this judicial circuit.

STATEMENT OF THE CASE

I. The Board's Finding of Fact

The Board found that respondents,³ although justified initially in locking out non-striking employees in response to the Union's strike against one member of their multi-employer bargaining unit, violated Section 8(a)(3) and (1) of the Act by thereafter intermittently recalling and again locking out their employees in order to frustrate any rights those employees might have had to receive unemployment insurance.

The facts found by the Board were stipulated by and between counsel for the respondents, the charging party and the General Counsel of the Board (R. 72; 25). Insofar as relevant to the violations found, they are as follows:

² Relevant portions of the Act appear in the Appendix, *infra*, pp. 19-21.

³ No jurisdictional issue is presented. Jurisdictional facts were stipulated (R. 27-28) and the Board found that respondents were engaged in commerce within the meaning of the Act (R. 72-73, 91).

A. The bargaining impasse

For almost ten years prior to 1957 there had been an established bargaining relationship between the Great Falls Employers' Council, Inc. (hereinafter called Council), as the sole collective bargaining agent for its member employers, and the Retail Clerks International Association, Local Union No. 57, AFL-CIO (hereinafter called Union), as bargaining representative for a unit of sales clerks and checkers composed of the employees of all the members of the Retail Food Dealers Division of the Council (R. 73; 29).

During the course of negotiations for a new contract, the Council and the Union, during the period February 22 to April 12, 1957,⁴ met in seven bargaining sessions, three of which were attended by a conciliator from the Federal Mediation and Conciliation Service (R. 73; 31). Although the existing contract expired March 31, the parties by tacit agreement continued to operate within its terms during the subsequent negotiations (R. 74).

On April 12 the Council submitted a "final proposal" which, as slightly amended during a meeting which the conciliator attended, was presented to the Union membership that evening. After voting to reject the proposal, the membership also voted to strike one employer-member of the Council, authorizing its Executive Board to determine which employer would be struck (R. 74; 31). The Union members were warned of the possibility of a lockout by the Council

⁴ All dates are 1957 unless otherwise noted.

members not struck and advised that, in that event, the locked-out employees should register with the Montana Employment Service to secure other jobs and to be eligible for unemployment compensation. They were also warned that, under the State law, the strikers would not, and locked-out employees might not, receive unemployment compensation because of the existence of a labor dispute (*Ibid.*).

B. The Union strikes Buttrey. Respondents lockout the non-striking employees, withdraw their final proposal, and renounce the terms of the expired contract

The Union Executive Board designated Buttrey Foods, Inc., as the Division member to be struck. The strike began Saturday, April 12, with picketing limited to the three Buttrey stores. The other member-employers of the Division "acting in concert and pursuant to instructions of their Division" thereupon sent home all the employees in the unit represented by the Union (R. 74-75; 32). In so doing they were prompted by the picketing of the member-employer and their desire "to preserve the unity of their position" (R. 74; 32). Subsequently, Buttrey closed one of its three stores and Safeway (also a member of the Council) closed two of its four stores for the duration of the strike. All other stores remained open despite the strike and lockout (R. 75; 32).

On April 15 the Council informed the Union that the lockout had taken place as a defensive response to the strike and to preserve their interest in group bargaining. The same letter also informed the Union that the "final proposal," rejected by the Union on April 12, was being withdrawn and that the employer

members of the Division would no longer honor the terms of the expired contract, except for the basic hourly rates and certain vacation privileges which would "continue without interruption, in order that the rights of employees shall not be impaired" (R. 47-49).

C. The Council protests unemployment compensation applications of the locked-out employees and institutes an intermittent lock-out plan to assure disqualification of the employees from receiving benefits

On Monday, April 12, most of the locked-out employees registered with the Montana Unemployment Compensation Commission to obtain other jobs and to qualify for unemployment compensation (R. 75-76; 32-33). When given notice of the filing of the claims, the Council filed a protest with the Unemployment Commission on behalf of all the employers against the payment of any benefits to these employees. Payment of unemployment compensation was objected to on the statutory grounds for disqualification,⁵ *inter alia*, that "Each of such employees is involved in a work stoppage which exists because of a labor dispute at the establishment where he is employed" (R. 76; 33, 67-69).

The Council considered the employee claims to be an effort to make "an unprincipled use" of the compensation fund as a strike fund. It also considered their possible allowance to be contrary to the declared public purpose of the compensation fund to "benefit persons unemployed through no fault of their own"⁶

⁵ 6 Revised Codes of Montana 1947, 1957 Cum. Supp., Section 87-106(d), (R. 52).

⁶ *Id.*, Section 87-102 (R. 55-56).

(R. 76, 83; 33; 55-56). Thereafter, without waiting for an initial determination by the Unemployment Compensation Commission of the merits of the claims and the public policy involved, the Council admittedly sought means of effectively preventing payment of the claims pending a time-consuming protest and appeal (*Ibid.*).⁷

For the purpose of effectively disqualifying the locked out employees from receiving unemployment benefits, the employers decided to offer each of them work for a period of more than eight hours which would permit them to earn more than \$16 during each week of the lockout (R. 76; 33). That length of employment and amount of earnings was the minimum amount which would disqualify them from benefits under the statute.⁸ If the employees accepted the work they would be disqualified because of their employment; if they refused the proffered employment on their own initiative they would be disqualified for having failed to accept available employment; and if they refused at the behest of the Union they would be disqualified as strikers (R. 76; 33-34).

The strategem was put into effect immediately by issuance of a written notice to each locked-out employee, followed up by telephoned reminders, informing him to report to work at a designated time on Friday, April 19. Employees with interim jobs were

⁷ The Council had prevailed in its contentions before the Commission and the Union had appealed the Commission's ruling at the time of submission of this case to the Board (R. 40).

⁸ *Id.*, Sec. 87-149(3), (R. 55).

not required to report for work if they chose not to do so. The Union advised its members to return to work as requested (R. 77; 34-35).

The recalled employees were given a full days work on April 19 and such additional work on April 20 as would permit them to earn \$16, whereupon they were again laid off. They were candidly informed that the purpose of the interim employment was to render them ineligible for unemployment compensation. Only the employees of Al's Food Market and Wally's Superette were given full-time work when recalled on April 19 (R. 77; 35-38). Although the Union immediately informed the Council by letter delivered April 20 that it would consider that any further locking out of the recalled employees to be an unfair labor practice under the Act (R. 77; 35, 50-51), the employers repeated their strategem the next week by again offering temporary employment for April 26 and 27. On April 27 the employment became regular by virtue of an agreement reached on that date between the Council and the Union and no further locking out took place (R. 77; 39-40).

II. The Board's conclusions and order

Upon the foregoing facts the Board, with two members dissenting, concluded that the April 13 lockout was privileged as a defensive lockout for protection of the multi-employer bargaining unit (R. 81-82). It found, however, that "Respondents' action in locking out their recalled employees on April 20, 1957, was a manipulation of tenure and terms of employment which infringed upon the collective bargaining rights

of these employees and tended to discourage support of the Union and concerted activity for mutual aid and protection, in violation of Section 8(a)(3) and (1) of the Act (R. 86).⁹

To remedy the violation, the Board ordered respondents to cease and desist from the unfair labor practices found (R. 92-93). The order also provides for back pay for the period from April 19 to April 26, for each employee discriminated against (R. 93; 101-103, 106), and for the posting of appropriate notices (R. 93-94; 103-106).

ARGUMENT

The Board properly concluded that the members of a multi-employer bargaining unit, although justified initially in locking out their nonstriking employees in response to the Union's strike against one of their members, violated Section 8(a)(3) and (1) of the National Labor Relations Act by thereafter intermittently recalling and again locking out their employees in order to frustrate any rights those employees may have had to receive unemployment insurance

The Board's finding that respondent's lockout of their employees on April 13 was a lawful defensive measure "to protect the multi-employer unit from disintegration threatened by the Union's tactic of calling a 'whipsaw' strike" (R. 81), but that the subsequent lockout on April 20 was not privileged accords with the principles established by the Board and the

⁹ The Board unanimously dismissed complaint allegations that respondents had violated Section 8(a)(5) of the Act by renunciation of prior bargaining commitments (R. 87) and unilateral action in instituting partial reemployment (R. 87-90). On the latter issue, the charge was dismissed because the Union had acquiesced in the unilateral changes (R. 90).

courts in other cases. Whether in a given case an employer, in furtherance of a collective bargaining dispute, may lawfully lock out his employees involves, as the Supreme Court has noted, "a balancing of the conflicting legitimate interests." And the "function of striking that balance to effectuate national labor policy is * * * a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *N.L.R.B. v. Truck Drivers Union (Buffalo Linen Supply Co.)*, 353 U.S. 87, 96. Hence, the Board's accommodation of the conflicting interests is entitled to stand if it is reasonable.¹⁰

Where a strike would exert an extraordinary pinch upon the employer, it has been held that he may lock out to defend against this extra hazard. He may, for example, temporarily lock out employees in anticipation of a scheduled strike where spoilage of materials would otherwise result (*Duluth Bottling Association*, 48 NLRB 1335, 1336, 1359-1360); because of the difficulties in planning production in the face of recurrent work stoppages (*International Shoe Co.*, 93 NLRB 907); where, because of a union's refusal to promise sufficient advance notice of a threatened strike, new repair work could not be taken with assurance that it would be finished and returned to customers (*Betts Cadillac Olds, Inc.*, 96 NLRB 268); and to prevent atomization of a multi-employer bargaining unit (*N.L.R.B. v. Truck Drivers Union, supra*). Where, on the other hand, the action taken by the employer

¹⁰ *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 131; *Gray v. Powell*, 314 U.S. 402, 412-413.

exceeds the needs of defense, it is regarded as an unwarranted infringement of employee rights and thus not privileged. Thus, it has been held that employers may not go so far as to discharge their employees in order to preserve the multi-employer bargaining unit (*Morand Bros. Beverage Co. v. N.L.R.B.*, 204 F. 2d 529, 534-535 (C.A. 7), certiorari denied, 346 U.S. 909); nor may an employer, prior to an impasse in bargaining and while under no imminent threat of a strike by the union, lock out his employees to gain a bargaining advantage (*Quaker State Oil Refining Corp. v. N.L.R.B.*, 270 F. 2d 40 (C.A. 3), certiorari denied, December 7, 1959).

Applying these general principles, we shall show that there is a rational basis for the Board's distinction between the lockouts of April 13 and 20 and its conclusion that the first was a legally permissible defensive measure and that the other was not. The Board reasonably inferred in this case, as in *Truck Drivers, supra* (353 U.S. at 90-91), that "although not specifically announced by the Union, the strike against the one employer necessarily carried with it an implicit threat of future strike action against any or all of the other members of the [Council]' with the 'calculated purpose' of causing 'successive and individual employer capitulations'." Respondents' action on April 13 in temporarily locking out the nonstriking employees was only for the purpose of protecting "the multi-employer unit from the disintegration threatened by the Union's tactic of calling a 'whipsaw'

strike against one employer member in support of demands against all" and "was therefore 'defensive and privileged in nature, rather than retaliatory and unlawful'" (R. 81-82). *Truck Drivers, supra* (353 U.S. at 91); *Leonard v. N.L.R.B.*, 197 F. 2d 435, 205 F. 2d 355, 357-358 (C.A. 9); *Morand Bros. Beverage Co. v. N.L.R.B.*, 190 F. 2d 576, 204 F. 2d 529, 530-531 (C.A. 7), certiorari denied, 346 U.S. 909, rehearing denied, 346 U.S. 940; *N.L.R.B. v. Spalding Avery Lumber Co.*, 220 F. 2d 673, 675-676 (C.A. 8); *N.L.R.B. v. Continental Baking Co.*, 221 F. 2d 427, 431-432, 437 (C.A. 8).

However, in rehiring their locked-out employees on April 19 and again laying them off the next day as soon as each had earned \$16, respondents, as the Board found, "were not seeking to protect their legitimate interest in bargaining on a group basis; indeed, by voluntarily breaking their own lawful lockout, they demonstrated that they did not believe the multi-employer unit was then in any danger from the Union's strike action. This conduct was not defensive in nature, but instead, was patently in retaliation against the concerted, union-directed efforts of these employees to procure unemployment insurance benefits pending settlement of the labor dispute" (R. 82). It "was a manipulation of tenure and terms of employment which infringed upon the collective bargaining rights of these employees and tended to discourage support of the Union and concerted activity for mutual aid or protection in violation of Section 8(a) (3) and (1) of the Act" (R. 86).

Thus, respondents, in asserted justification of their tactic of recalling the locked out employees on April 19 and again locking them out on April 20, contended that they believed, on the basis of prior decisions of the Montana Unemployment Compensation Commission, that the employees might be successful in obtaining unemployment insurance payments unless respondents took steps to prevent the payments and that respondents were only seeking "ways and means of curtailing what they thought to be an unprincipled use" of the Unemployment Compensation fund (R. 33). They admittedly advised the recalled employees "that their reemployment was to circumvent the unemployment compensation" (R. 35). Expanding their position further, respondents asserted in an advertisement issued during the lockout that, "as conducted, the strike attempts to take unfair and illegal advantage of unemployment compensation funds to which as taxpayers we all contribute" (R. 70).

In short, respondents' motivation for the April 20 lockout was quite different from that motivating the April 13 lockout. The lockout was no longer for the purpose of protecting the multi-employer bargaining unit from atomization. It was, instead, for the purpose of preventing the employees from receiving from the State whatever economic assistance that would normally flow from respondents' lawful defensive lockout on April 13 and, incidentally, of preventing any possible increase in respondents' tax rate. Respondents, of course, were privileged to—and did

with success—protest and vigorously prosecute before the Unemployment Commission their claim that the locked out employees were not entitled to unemployment insurance benefits. But they were not privileged to lock out their employees for the purpose of preventing the results which normally would flow from administration by the state of its unemployment insurance laws. The lockout for that purpose was not a lawful economic weapon. It was, rather, “an offensive weapon to better [respondents’] bargaining position and as a result * * * distorted the bargaining process to a degree where [they] obtained an unfair bargaining advantage.” *Quaker State Oil Refining Corp. v. N.L.R.B.*, 270 F. 2d 40, 45 (C.A. 3), certiorari denied, December 7, 1959.

The April 20 lockout interfered not only with the exercise by the employees of their statutorily protected right to engage in the Union-directed efforts to obtain unemployment insurance,¹¹ but also with their

¹¹ As this Court pointed out in *Salt River Valley Water Users' Association v. N.L.R.B.*, 206 F. 2d 325, 328, it is immaterial that what the employees sought were payments to which they would be entitled, if at all, as individuals (payments under the Fair Labor Standards Act in that case), for they had concertedly decided to pursue those individual rights and “‘concerted activity for the purpose of * * * mutual aid or protection’ is often an effective weapon for obtaining that to which the participants, as individuals, are already ‘legally’ entitled.” Accord: *N.L.R.B. v. Moss Planning Mill Co.*, 206 F. 2d 557, 559–560 (C.A. 4). The Union in this case not only directed the locked out employees to apply for unemployment insurance but represented them before the Commission and, following denial by the Commission of the employees’ claims, appealed the Commission’s decision (R. 40).

right to strike.¹² Their right to strike included their right to determine the timing, the scope and the manner of conducting their strike. To be sure, as we have shown, respondents, in the interest of protecting the multi-employer unit, were privileged to lock out the employees not included in the strike call. This was a justifiable defensive step. But when they went further and adopted the tactic of intermittently recalling and again locking out the non-striking employees, their action exceeded what was needed to protect against the direct impact of the Union's activity, and

¹² The right to strike, of course, is encompassed within the protective scope of Section 7 of the Act, and Section 13 expressly singles out this form of concerted activity for protection by providing that: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike * * *" *N.L.R.B. v. International Rice Milling Co.*, 341 U.S. 665, 673.

Indeed, the right to strike is fundamental to the exercise by employees of their right to bargain collectively and an interference with their right to strike infringes upon their collective bargaining rights. A strike or threat to strike is the employees' only effective weapon for enforcement of what they conceive to be just demands upon their employer. The employer, on the other hand, except in unusual circumstances, has effective means other than the lockout to protect his bargaining position. To counteract the strike weapon, he has the undoubted "right to protect and continue his business by supplying places left vacant by the strikers." *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345. And whether or not there is a strike, he may break an impasse in negotiations in his favor, after good faith bargaining, by instituting unilaterally those changes in employment terms which he has offered the employees' bargaining representative and which they have rejected during the negotiations. *N.L.R.B. v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-225.

became retaliatory. In sum, respondents attempted to penalize the employees for conducting a limited strike and making a concerted effort, through their Union, to obtain for those not striking any benefits to which they might be entitled under state law and policy.

Moreover, the interest which respondents sought to protect by such action was not sufficient to warrant this interference with employee rights. That is, the Board properly rejected the contention that the lock-out was justified in order to protect respondents against the possibility that their tax contributions to the unemployment reserves under the state's experience rating formula might be increased. Any economic detriment in this respect which respondents stood a chance of suffering is both speculative and remote. And, respondents had effective means other than a lockout to protect both the state's unemployment reserves and incidentally, its own tax contribution to those reserves. Montana statutes specifically provided the means by which interested parties might present their contentions with respect to such matters and have them resolved by the Unemployment Compensation Commission, with further opportunity for review in the state courts.¹³ Even assuming that the

¹³ 6 Revised Codes of Montana, 1947, Sec. 87-108; 1957 Cum. Supp., Sec. 87-107. Respondents, while pursuing these statutory provisions for testing the right of locked out employees to unemployment benefits, took the inconsistent step of disqualifying the employees in any event for these benefits by recalling them each week for \$16 worth of work. The Commission, although not required in these circumstances to decide the legal issue initially presented to it, nevertheless did so. Its

locked-out employees were entitled under Montana laws to unemployment benefits and that the lockout might continue for a length of time sufficient to increase respondents' tax contribution to the reserve fund, respondents' economic loss would, in any eventuality, appear to be insubstantial.¹⁴ It is not that type of unusual economic loss which the Board has held in other cases entitles an employer to lock out his employees as a defensive measure. (See examples *supra*, p. 9).

In rejecting an argument that the Board should, in order to complement the public policy of the state, sanction this type of employer interference with the employees' protected concerted activities, the Board pointed out that, depending on how each state construes its applicable statutes, the Board might find itself assisting the employer in circumventing rather than in complementing state policy (R. 85). In short, the Board believes that its power to find and remedy unfair labor practices ought not to "hinge on the myriad provisions of state unemployment compensation laws." *Gullet Gin Co. v. N.L.R.B.*, 340 U.S. 361, 365. If, as the Supreme Court held in *Gullet Gin*, the Board may properly refuse to permit an employer to deduct from back pay due discriminatorily discharged

ruling that the employees locked out as a defense to the Union's "whipsaw" strike were involved in a labor dispute and therefore not entitled to unemployment benefits (R. 64-65) was, at the time the matter was presented to the Board, pending in an appropriate state court on appeal by the Union (R. 40).

¹⁴ See, 6 Revised Codes of Montana (1959 Cumulative Pocket Supp.), Sec. 87-109; and 26 USCA, Sec. 3301-3302.

employees the amounts of unemployment benefits received by them on the ground that those benefits were not direct but only collateral,¹⁵ it would seem that the Board may, by analogy, properly find that respondents' interest in these collateral benefits is not so great as to warrant respondents' interference with the employees protected concerted activity in attempting to obtain these benefits and in pursuing their strike plans. In any event, at the Board stated, here as in the *Gullet Gin* case, "any failure of respondent[s] to qualify for a lower tax rate would not be primarily the result of federal but of state law, designed to effectuate a public policy with which it is not the Board's function to concern itself." (*Id.*, at 365).

For the foregoing reasons, we submit that the Board gave proper weight to the "conflicting legitimate interests" of the parties, and that under the facts of this case, it reasonably concluded that respondents' action in locking out their recalled employees on April 20 constituted discrimination against them which infringed upon their collective bargaining rights and tended to discourage support of the Union and con-

¹⁵ In this connection the Court stated (340 U.S., at 364:

"But respondent argues that the benefits paid from the Louisiana Unemployment Compensation Fund were not collateral but direct benefits. With this theory we are unable to agree. *Payments of unemployment compensation were not made to the employees by respondent* but by the state out of state funds derived from taxation. True, these taxes were paid by employers, and thus to some extent respondent helped to create the fund. However, the payments to the employees were not made to discharge any liability or obligation of respondent, but to carry out a policy of social betterment for the benefit of the entire state." (Emphasis supplied.)

certed activity for their mutual aid or protection, in violation of Section 8(a)(3) and (1) of the Act (R. 86).

CONCLUSION

It is respectfully submitted that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

DECEMBER 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10(a) The Board is empowered, as hereinafter provided, to prevent any person

from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and

enforcing as so modified, or setting aside in whole or in part the order of the Board.

* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

GREAT FALLS EMPLOYERS' COUNCIL, INC., RETAIL FOOD DEALERS DIVISION, AND ITS MEMBER EMPLOYERS, BUTTREY FOODS, INC., SAFEWAY STORES, INC., PAUL A. MATTEUCCI, d/b/a MATTEUCCI'S SUPER SAVE MARKET, PAUL A. MATTEUCCI, d/b/a SOUTHGATE SUPER SAVE MARKET, JOHN EUSTANCE, d/b/a WHITE HOUSE GROCERY, ROBERT NOBLE AND JOHN H. NOBLE, d/b/a NOBLE MERCANTILE COMPANY, E. R. FJELSTAD, d/b/a AL'S FOOD MARKET, AND WALLACE ANDERSON, d/b/a WALLY'S SUPERETTE, Respondents

ON PETITION FOR ENFORCEMENT OF AN
ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

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IN THE
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 16565

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

GREAT FALLS EMPLOYERS' COUNCIL, INC., RETAIL FOOD DEALERS DIVISION, AND ITS MEMBER EMPLOYERS, BUTTREY FOODS, INC., SAFEWAY STORES, INC., PAUL A. MATTEUCCI, d/b/a MATTEUCCI'S SUPER SAVE MARKET, PAUL A. MATTEUCCI, d/b/a SOUTHGATE SUPER SAVE MARKET, JOHN EUSTANCE, d/b/a WHITE HOUSE GROCERY, ROBERT NOBLE AND JOHN H. NOBLE, d/b/a NOBLE MERCANTILE COMPANY, E. R. FJELSTAD, d/b/a AL'S FOOD MARKET, AND WALLACE ANDERSON, d/b/a WALLY'S SUPERETTE, Respondents

ON PETITION FOR ENFORCEMENT OF AN
ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENTS

JURISDICTION

No issue is raised by the respondents respecting jurisdiction of either the National Labor Relations Board or the United States Court of Appeals for the Ninth Circuit. Jurisdictional facts were stipulated. (R. 27-28)¹

STATEMENT OF THE CASE

The statement of the case set forth in appellant's brief (B. 1-8) is sufficiently precise as to require modification in only six (6) particulars:

1. Counsel for appellant state: “. . . After voting to reject the proposal, the membership also voted to strike one employer-member of the Council, authorizing its Executive Board to determine which employer would be struck. (R. 74; 31) The union members were warned of the possibility of a lockout by the Council members not struck . . .” (B. 3-4).

The language selected by counsel for appellant implies a specific vote by members of the union conferring authority on the Executive Board to select the employer to be struck and implies a specific warning that a lockout was to be anticipated. Such is not the case. The stipulated facts are as follows:

“. . . At a meeting of the Union on that evening, the Union elected to reject the Council's final proposal. Thereupon the Union voted to strike one employer-member of the Council, and its Executive Board made the determination that the Union would strike Buttrey

¹ References to the printed record are designated “R.” References preceding a semi-colon are to the Board's findings; those following are to the supporting evidence. References to the brief of appellant are designated “B.”

Foods, Inc. The Union advised its members that in the event of a lockout, all locked out employees should register with the Montana Employment Service . . ." (R. 31).

2. The date, "Saturday, April 12" (B. 4), should be modified to read "Saturday, April 13" (R. 74). The date "Monday, April 12" (B. 5), should be modified to read "Monday, April 15" (R. 75).

3. Counsel for appellant delineate the motives or reasons for the employer action complained of as follows:

"The Council considered the employee claims to be an effort to make 'an unprincipled use' of the compensation fund as a strike fund. It also considered their possible allowance to be contrary to the declared public purpose of the compensation fund to 'benefit persons unemployed through no fault of their own' (R. 76, 83; 33, 55-56)," (B. 5-6).

This statement of counsel omits reference to other factors weighed by respondents before undertaking the course of conduct which is the subject of the Board's charge. The stipulated facts and findings of the Board assign additional reasons or motives:

". . . Respondents, 'taking notice of prior decisions' of the Commission and 'being advised that a direct protest and definitive appeal would take from weeks to years and that compensation might nevertheless be paid pending the appeal,' then admittedly sought effectively to frustrate what they claimed to be 'an unprincipled use' of the unemployment fund as a strike fund . . ." (R. 76; 33).

4. Counsel for appellant have inferred matters from the stipulated facts and the findings of the Board which are not factual, in stating: ". . . Thereafter, without waiting for an initial determination by the Unemployment

Compensation Commission of the merits of the claims and the public policy involved, . . .” (B. 6).

No “initial determination,” as defined by applicable Montana Law (R. 53-54), was made respecting the merits of the unemployment compensation claims filed, in this instance, by employees. No determination of any kind was made respecting the merits of such claims until the strike-lockout had ended and work was resumed. In this instance, Charles Peterson, the Supervising Claims Examiner or “Deputy,” referred his findings of fact to the Montana Unemployment Compensation Commission for the rendition of a “decision,” all in keeping with the provisions of Sections 87-107 (b) and 87-106 (d), *Revised Codes of Montana*, 1947 (R. 52-54, 56-66). The strike-lockout was settled on 24 April 1957, a settlement memorandum was executed on 26 April 1957 and the employees returned to work on 27 April 1957 (R. 39-40). The report of the “Deputy” to the Commission was not made until 14 May 1957 (R. 56) and the first determination respecting the merits of the claims for unemployment compensation was rendered by the Commission on 24 May 1957 (R. 40).

5. The monetary figure of “\$16” (B. 6) should be changed to read “\$15.00” (R. 33).

6. Both the Board in its findings of fact (R. 77) and counsel for appellant in its statement of the case (B. 7) erred in stating that “. . . the union immediately informed Council by letter delivered April 20 that it would consider any further locking out of the recalled employees to be an unfair labor practice under the Act . . .” Union’s

letter was delivered to the individual employers on 20 April 1957 (R. 35); it was not received by Council until 22 April 1957 (R. 50), after the second lockout had been effected.

ARGUMENT

I. SUMMARY

The argument of respondents will be directed to the following five (5) matters:

A. Judicial review of determinations by the National Labor Relations Board.

B. The asserted violations of Section 8(a)(1) of the National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C.A. Secs. 151, et seq.) referred to herein as the Act.²

1. Efforts by employees to procure unemployment compensation payments are not "concerted activities" within the meaning of Section 7 of the Act.
2. Admitting, arguendo, that efforts of employees to procure unemployment compensation payments are "concerted activities," they are not such activities as should be afforded the protection of the Act in derogation of an employer's right to self help.

C. The asserted violations of Section 8(a)(3) of the Act. Encouragement toward or discouragement from union membership cannot reasonably be inferred as a natural consequence of the employer conduct cited.

² Relevant portions of the Act appear in the Appendix of appellant's brief, pp. 19-21.

II. JUDICIAL REVIEW:

Judicial review of determinations made by the Board are governed by Section 10(e) of the Act.³ Since this cause was submitted to the Board on a stipulated set of facts, no preliminary determination was made by an examiner and the Court now has before it everything which was available to the Board in making its findings and order.

The case presents a factual situation resting in the misty penumbra of the law cast by the Act's open but un-enlightening reference to lockouts⁴ and the decision of the United States Supreme Court in the case popularly referred to as the *Buffalo Linen Case*.⁵

In the *Buffalo Linen Case*, the Court failed to endorse the lockout as an absolute corollary to a strike but formulated the premise that in indeterminate circumstances, the lockout should not be denied by the Board to employers, as a means of self help. Having so licensed the lockout, the Court further enjoined the Board and lower courts against a narrow exercise of discretion in permitting employers the use of the remedy.⁶

³ Appendix, p. (32).

⁴ Section 8 (d) (4).

⁵ *NLRB v. Truck Drivers Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL*, 353 U.S. 87; 1 L Ed 2d, 676.

⁶ 353: "Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small

While making a determination of whether the Board correctly balanced the equities in the case at bar, the Court must keep four (4) general principles in mind:

- A. Has the Board sustained the burden of proof incumbent upon it, to demonstrate the essential elements of charges under Sections 8(a)(1) and 8(a)(3) of the Act?
- B. Has the Board afforded the evidence proper weight; that is, has it considered respondent's motive in promulgating a lockout and if so, might it reasonably have inferred a lawful as well as an unlawful motive as its germinating force?
- C. Are the Board's findings and conclusions supported by substantial evidence on the record as a whole?
- D. Do the Board's findings and conclusions rest on erroneous legal foundations?

With respect to the burden of proof required under

employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult, and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.

* * * * *

353: "The Court of Appeals recognized that the National Labor Relations Board has legitimately balanced conflicting interests by permitting lockouts where economic hardship was shown. The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship . . . "

Sections 8(a)(1) and 8(a)(3) it is our opinion that degree is the only basis of distinction between a lockout and a discharge. The former is temporary, the latter permanent. It would appear logical, in consequence, that the elements necessary to sustain a charge of unlawful discharge under Sections 8(a)(1) and 8(a)(3) of the Act should be identical to those necessary to sustain charges based upon an unlawful lockout under the same sections. Before the employer's right to manage and discipline can be declared contrary to these provisions of the Act it must be demonstrated that: (1) ". . . the employer knew that the employee was engaging in some activity protected by the Act . . ."; (2) ". . . the employee was discharged [locked out] because he had engaged in a protected activity . . ."; (3) ". . . the discharge [lock out] had the effect of encouraging or discouraging membership in a labor organization. . . ." ⁷

The real question arising here, is whether the seeking of unemployment compensation payments, under these circumstances, is a protected activity. It should be patently obvious, considering the state of the law, that the re-

⁷ ". . . Until there is a reasonable basis in the evidence for making these findings, the employer need not excuse or justify his action . . . When the evidence of the charging party has raised a reasonable inference of discrimination, that inference may still be rendered unreasonable by the employer's excuse or justification . . . so that more evidence must be produced to establish the alleged discrimination . . . " *N.L.R.B. v. Whittin Machine Works*, 204 F 2d, 883 (CA9) (885). The burden is on the Board to prove a prima facie case, *NLRB v. Goodyear Footwear Corp.* 186 F 2d, 913 (CA7).

spondents did not *know*, and still do not *know*, whether the acts of their employees in seeking unemployment compensation was a protected activity. In the absence of some prior determination that a given activity is or is not protected, the burden of proof resting on the Board becomes inextricably mixed with its duty of balancing the equities between employers and employees in reaching a determination as to which employee activities should and should not be afforded the protection of Sections 7 and 8(a)(1) of the Act. Any consideration, then, of whether the Board has fairly met the burden of proof incumbent upon it must then be deferred until its extension of the Act's protection has been tested.

In the consideration of charges arising both under Section 8(a)(1) and Section 8(a)(3), motive and other inferences which may be gleaned from the evidence bear materially on whether the findings and conclusions of the Board are supported by substantial evidence.

"When the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the respondent to be guilty of an unfair labor practice. Motives are notoriously susceptible of being misunderstood and hard to prove or disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then indeed our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where findings are supported by substantial evidence, that evidence is possessed of genuine substance. . . ." ⁸

⁸ *NLRB v. Huston Chronicle Pub. Co.*, 211 F 2d, 848 (CA5) (854-855).

With respect to the 8(a)(1) charge, there is no positive evidence in the record revealing the motive of the respondents in effecting the second lockout of 20 April 1957. It is clear, however, that the purpose of the lockout was to prevent the payment of full unemployment compensation benefits pending a final determination. The Board, however, finds “. . . This conduct was not defensive in nature, but instead, was patently in retaliation against the concerted, union directed efforts of these employees to procure unemployment insurance benefits pending settlement of the labor dispute. . . .” (R. 82) By inverse reasoning, it would appear that had the Board inferred from the evidence that the second lockout was defensive in nature, rather than retaliatory, it would have found the lockout to be lawful and thus properly motivated.

We cannot fathom by what reasoning and upon what evidence the Board is justified in raising the inference that respondents' conduct was retaliatory. No more can we understand how the Board failed to conclude, in the face of the evidence, their after the fact advertisement (R. 70), their calm announcement to returning workers that the purpose of the re-call was to cut off compensation (R. 35), and the chronological sequence of events, that respondents' lockout of 20 April 1957 was a defensive shift in tactics precipitated by mass filings for unemployment compensation benefits, which, if granted, could only have served to lengthen the strike by giving the individual participants greater financial security than their union strike benefits alone would have permitted. The logical inferences to be raised from the actions of the respondents

is that they were not only seeking to prevent a misuse of public funds but also to restore labor peace and the usual uninterrupted flow of their businesses within the time limitations normally permitted by the unenhanced resources of both employers and employees. The second lockout was a defensive tactic taken to insure the maintenance of the status quo.

The failure of the Board to raise these inferences is indicative of its failure to weigh all of the evidence, is indicative that “. . . the Board in its decision, starts out by assuming that the respondent company has the burden of disproving the charge . . .”⁹ In so doing, it has flagrantly ignored the cardinal principles of interpretation delineated by the Supreme Court.¹⁰

⁹ *NLRB v. Goodyear Footwear Corp.*, Ante, n. 7, p. 917.

¹⁰ *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 95 L. Ed. 456:

487-488 (467-468): “Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record . . . ”

* * * * *

“ . . . Nor does it mean that even as to matters not requiring expertise a court may displace the Board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo. Congress has merely made it clear that a reviewing court is

The consideration of motive and the problem of reasonable inferences to be drawn respecting the 8(a)(3) charge will be treated together in later sections.

With respect to the four (4) general matters to be considered by the Court in viewing the case as a whole, there remains for consideration general error in law.

In *National Labor Relations Board v. Avery Lumber Co.*, 220 F 2d, 673 (CA8), decided 7 April 1955, the Court said at page 675:

“The Board in seeking enforcement of its order has abandoned its contention that the respondents were not

not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board’s view.”

490 (468-469): “We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board’s findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board’s decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.”

See also: *N.L.R.B. v. Continental Baking Company*, 221 F 2d, 427 (CA8).

entitled to lock out their employees solely for economic reasons in view of the decision of the Ninth Circuit in *Leonard v. National Labor Relations Board*, 205 F 2d 355, and the decision of the Seventh Circuit in *Morand Bros. Beverage Co. v. National Labor Relations Board*, 190 F 2d 576, but it now seeks to sustain its order solely on the ground that the respondents consented to individual employer bargaining and by so doing abandoned their right to act in concert for economic reasons. . . ."

On 20 April 1956, the Supreme Court, in rendering its decision in *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 100 L. Ed. 975, said at pages 112-113 (983):

"The determination of the proper adjustments rests with the Board. Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations. . . ."

On 1 April 1957, the Supreme Court in rendering its decision in *N. L. R. B. v. Truck Drivers Local* (ante), the court said at page 97 (682): ". . . The court erred, however, in too narrowly confining the exercise of Board discretion to the cases of economic hardship . . ."

Notwithstanding the Board's position in the Avery Lumber case and notwithstanding the principles and admonitions of the Supreme Court in the Babcock & Wilcox and Truck Drivers Local cases, the Board found in this case:

". . . But assuming, arguendo, that such are the consequences, we do not think they constitute those special circumstances which the Board has held, in other cases, entitle an employer to lockout in order to protect his business from unusual economic loss." (R. 84-85).

Having disposed of the lockout of 13 April 1957, by finding it lawful, it would appear that the Board erred in its application of the law by declaring the second lockout of 20 April 1957 unlawful.

III. THE ASSERTED VIOLATIONS OF SECTION 8(a)(1):

(A) Efforts by Employees to Secure Unemployment Compensation Are Not Concerted Activities Within the Meaning of Section 7 of the Act.

Though this point was raised in respondents' presentation to the Board, it was afforded no mention in the Board's findings.

We are aware that concerted activity is deemed to include both union and non-union activity¹¹ and has even been ruled applicable to efforts of employees to secure collective representation at legislative hearings on a bill to increase benefits under a Workman's Compensation Act.¹² We are aware that employees may band together to procure that to which they are already legally entitled;¹³ but we are also aware that concerted activity for unlawful purposes is not that sort of concerted activity contemplated by Section 7¹⁴ and that not all concerted activity is afforded protection under the Act.¹⁵

¹¹ *N.L.R.B. v. Phoenix Mut. Life Ins. Co.*, 167 F 2d, 983 (CA7).

¹² *Bethlehem Shipbuilding Corp. v. N.L.R.B.*, 114 F 2d, 930 (CA1).

¹³ *Salt River Val. Water Users Ass'n. v. N.L.R.B.*, 206 F 2d, 325 (CA9).

¹⁴ *N.L.R.B. v. Fansteel Metallurgical Corp.* 306 U.S. 240, 83 L. Ed. 627.

¹⁵ *Joanna Cotton Mills Co. v. N.L.R.B.*, 176 F 2d, 749 (CA4).

The procurement of unemployment compensation benefits is a purely personal, an individual right. Collective actions are not permitted; collective representation is still dependent upon the basic rights of each individual claimant; mass action puts pressure on the State.

In this case, the employees were not legally entitled to compensation (R. 40, 52, 56-66) and in view of the plain prohibition of Section 87-106, Revised Codes of Montana, 1947 (R. 52) it might be said that attempts to procure, or the procurement of, unemployment compensation under the circumstances presented in this case are unlawful.

It is clear that unemployment compensation benefits are collateral to the employer-employee relationship.¹⁶ It should be equally clear that the purpose of the employees in seeking unemployment benefits was not for their mutual aid or protection but their individual aid and protection, and had ". . . no relation to collective bargaining, hours or conditions of work . . ." ¹⁷ and thus should not be declared a concerted activity within the meaning of the Act.

(B) Admitting, Arguendo, That Efforts of Employees to Procure Unemployment Compensation Payments Are "Concerted Activities," They Are Not Such Activities As Should Be Afforded The Protection Of The Act in Derogation Of An Employer's Right To Self Help.

We turn now to the question of whether the Board properly balanced the conflicting, legitimate interests of the respondents and their employees. The majority of the Board took the view that after meeting the strike by their original lockout, thus having equalized economic pressure

¹⁶ *N.L.R.B. v. Marshall Field & Co.*, 129 F 2d, 169 (CA7)

¹⁷ *Joanna Cotton Mills v. N.L.R.B.*, supra n. 15.

by insuring the cohesion of their bargaining unit, the respondents had no further legitimate interests to pursue; that in recalling and again locking out their employees to prevent any potential award of full unemployment compensation benefits, they acted in retaliation and in fact demonstrated that the cohesion of their bargaining unit was not in danger.

With these conclusions we cannot agree, and in our opinion such conclusions are not supported by a substantial quantum of evidence. The rationale of the majority's argument confirms this conclusion. If, as the majority holds, the respondents ". . . demonstrated that they did not believe the multi-employer unit was then in any danger . . ." and that, ergo, their second lockout ". . . was patently in retaliation against the concerted, union directed efforts of these employees to procure unemployment insurance benefits pending settlement of the labor dispute. . . ." (R. 82), why did they, in viewing the entire fabric of the case, declare the original lockout to be a lawful balancing of legitimate interests. If their bargaining unit was in no danger of disintegration, if they were able to meet the economic strength of the union without the lockout, then at the outset they had no legitimate interests to balance against those of their employees in promulgating strike action.

But, the truth implicit in the evidence is that the respondents did have legitimate interests to balance in effecting the original lockout — those of spreading the economic hardship of the strike equally among all employees and employers and maintaining the unity of their

multi-employer group. Moreover, they had a legitimate interest in preserving this status, in meeting the union tactic by tactic, both in the stratum of economics and in the stratum of bargaining power. The employees sought to take advantage of State laws to tip the balance of power in their favor; the respondents took advantage of the same laws in an effort to counter their move.

Both the employees and the respondents were placed on the horns of a dilemma by the action and counter-action taken.

Had the employees succeeded in procuring the payment of compensation on an initial determination, they would have received \$32.00 per week in addition to union strike benefits until such time as the respondents, opposed by union counsel, had succeeded, if at all, in procuring a determination through administrative and court appeals that the employees were not entitled to such benefits, as participants in a labor dispute. Had the employers failed, funds in which they had a special interest, if not their own funds, would have been used against them, both during their endeavors and after failure, to finance and perpetuate the labor dispute; and, additionally their rate of contribution to the fund, in the future, under Montana's merit rating system, would have been increased. Assuming success by the employers on appeal, employees would nevertheless have had the benefit of compensation pending appeal, with the attendant augmented ability to prolong their economic pressure on respondents; and, even though benefits so paid would not have been charged to the specific accounts of respondents, they would have been

charged to the general unemployment compensation fund to which these respondents contributed and in which they have a specific interest. Finally, it must be noted in passing, that persistent charges to the general fund, which may tend to reduce it below that level at which all employer contribution rates are raised to the maximum, presented respondents with the prospect of increased payments even if they won their determination. (R. 95-97; 32-33, 52-54). Faced with these alternatives, the respondents felt that the payment of \$16.00 per week in return for some work, would be better than the payment of \$32.00 per week for no work.

By the employer counter-action, employees were placed in the anomalous position, under the State laws, of either accepting the \$16.00 per week or disqualifying themselves from all benefits as either economic strikers or persons declining work (R. 33-34, 52-54). It must be noted here that employees recalled to work were advised that the purpose of the recall was to forestall the payment of unemployment compensation.

So it would seem, that the employers did have legitimate conflicting interests which they sought to balance against those of the employees through the exercise of self help. But, the majority of the Board, contrary to the mandate of *N. L. R. B. v. Truck Drivers Local 449*¹⁸ seems to require some unusual economic hardship or loss to the respondents before it would balance the equities, and it contends that the respondents have no real interest in unemployment

¹⁸ Ante, n. 5.

compensation funds, therefore, they suffer no economic loss whether such funds are properly or improperly disbursed. We think the contrary is evident.

In *Chrysler Corporation v. Smith*, 298 N.W., 87 (Mich., 1941), the plaintiff intervened in proceedings before the Michigan Unemployment Commission in an effort to prevent the payment of unemployment compensation to its striking employees. The right of the state courts to enjoin the payment of compensation on an initial determination and pending final appeal (a provision similar to that of Section 87-107 (b) Revised Codes of Montana, 1947)¹⁹ and the right of the plaintiff Chrysler Corporation to appear in the case and protest payment were contested. The court enjoined payment declaring this section of the law unconstitutional, and permitted the appearance of Chrysler Corporation. With respect to the latter matter, the court said (pp. 92-93):

"Claimants question the right of the Chrysler Corporation to appear and contest their right to awards. This requires but short answer. As a contributor to the fund, having an interest in its proper disbursement, it was the right of the corporation, if not its duty, to see that the purpose and full integrity of the fund was preserved."

In passing, the comments of the Michigan Commission, quoted in the case, are worth noting.²⁰

¹⁹ R. 52-53.

²⁰ 90: " . . . The unemployment compensation fund should never be used to finance claimants who are directly involved in a labor dispute, nor should it ever be denied to claimants who are legally entitled to receive benefits. This fund is in many respects

The problems raised in *Chrysler Corporation v. Smith* (supra) were further pursued in *Chrysler Corporation v. Appeal Board of Michigan Unemployment Compensation Commission, et al.*, 3 N.W. 2d, 302 (Mich., 1942) and the principles of the Smith case iterated above were upheld.²¹ Petition for Writ of Certiorari to the Supreme Court of the United States was denied on this case.²²

a public trust fund and all who have custody [of] or control over it are in reality trustees who must at all times administer the fund in strict compliance with the provisions of the law. None of the money accumulated in this fund should ever be disbursed for the purpose of financing a labor dispute nor should it be illegally withheld for the purpose of enabling an employer to break a strike . . . ”

²¹ 304: “While it scarcely seems necessary, it may be noted that the fundamental reason for holding the double affirmation provision invalid, in the aspect now under consideration, is that otherwise the controverted issue of claimants’ right to be paid compensation would in effect be finally decided and the compensation paid without affording an adverse party any opportunity whatever to have obtained a judicial determination of the rights of the respective parties; and thereby the party contesting the employees’ claim to compensation would be deprived of the right to due process which is afforded by both the State Constitution and the *Federal Constitution*, *Const. Mich.*, Art. 2, § 16; *Const. U.S. Amend*, 14, whenever the controversy involves property rights. That the Chrysler Corporation has a property right in the unemployment compensation fund and in its just administration was also passed upon by Mr. Justice Wiest’s opinion in *Chrysler Corporation v. Smith*, supra, wherein it was said: ‘Claimants question the right of the Chrysler Corporation to appear and contest their right to awards. This requires but short answer. As a contributor to the fund, having an interest in its proper disbursement, it was the right of the corporation, if not its duty, to see that the purpose and full integrity of the fund was preserved.’

In *Tube Reducing Corporation v. Unemployment Compensation Commission, et al.*, 62 A 2d 473 (N.J., 1948), the questions respecting the constitutionality of provisions for the payment of immediate benefits pending appeal and an employer's right to prosecute a writ of certiorari to review a commission decision, the same questions as involved in the Smith case (*supra*), were brought before the courts of New Jersey and the same results were reached as in Michigan.²³

"In respect of his right and duty to have only lawful use made of the unemployment fund, the assessed employer is in substantially the same position as the ordinary taxpayer relative to public moneys acquired by taxation being used for lawful purposes only . . . "

²² No. 203, 317 U.S., 635, 87 L. Ed. 512, 12 Oct. 1942.

²³ 474: " . . . The policy of section 43:21-6 (b) (1) becomes readily apparent when considered in the light of the legislative purpose to provide immediate relief to the victims of involuntary unemployment. It has reference only to the initial proceeding for benefits brought by the employee. Here, the payments became chargeable to the respondent employer when made; and so the employer had an interest sufficient to challenge the adverse action below."

* * * * *

474: " . . . The provision for charging the benefits paid against the employer's account gave rise to a special and peculiar interest sufficient in itself to invest the respondent employer with the right of review by certiorari. . . . "

* * * * *

474: "The protection of the general or common interest rests with the public authorities. But in these circumstances the interest of the employer is something more than 'a common concern for obedience to law.' . . . "

* * * * *

475: "Moreover, the essential design of the statute is, as we

The unemployment laws of California, Michigan, New Jersey and Kentucky are, as may be observed from cases quoted, similar to those of Montana. If the respondents in this matter had secured an injunction against the payment of unemployment compensation to their employees, would the majority of the Board have held such action to violate Section 8(a)(1) of the Act? Of what does the Board complain, the remedy or the result? Under

have seen, the provision of relief against involuntary unemployment, and, in the furtherance of this purpose, to withhold benefits where the work stoppage is due to a labor dispute, unless the employee 'is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work.' R.S. 43:21-2, 43:21-4, 43:21-5, N.J.S.A. Thus, the policy of denying access to the fund as a means of sustenance to those unemployed because of participation in a labor dispute is outstanding; and it would seem to be axiomatic that the employer also has a special interest sufficient to justify his interposition to prevent the use of the fund, created to relieve unemployment that is in fact involuntary, and made up in substantial part by his contributions, R.S. 43:21-7, N.J.S.A., for the advancement of the interests of the adversary parties to the labor controversy, and so to preclude misuse of the fund constituting in effect governmental intervention in aid of a party to a labor dispute in violation of the clear legislative policy."

See to the same effect:

N. J. Zinc Co. v. Board of Review, 135 A 2d, 496 (N. J.) *Babb v. Bullitt, et al.*, 220 SW 2d, 394 (Ky): " . . . we . . . say that if employers generally are so related to the unemployment problem that they can be required by a moderate tax to pay into a fund to be administered for the benefit of the unemployed, that it necessarily follows that they are not so unrelated to the problem as to permit an indiscriminate payment of benefits out of the reserve solely created and maintained by that employer without any right to be heard . . . "

the rationale of the Board's decision, the result would have been the same, the respondents would have interfered with and restrained the exercise of concerted activities of their employees.

The majority of the Board expressed concern respecting dicta found in the *Gullett Gin* case,²⁴ particularly that:

"... The Board's power to find and to remedy unfair labor practices ought not to 'hinge on the myriad provisions of state unemployment compensation laws.' For, as the Supreme Court had held in a slightly different context but in language we think applicable here, 'any failure of respondent to qualify for a lower tax rate would not be primarily the result of federal but of state [unemployment compensation] law, designed to effectuate a public policy with which it is not the Board's function to concern itself.' " (R. 85-86).

The holding of the *Gullett Gin* case was simply to the effect that unemployment compensation received by employees was a collateral benefit which need not be deducted from a back pay order, the court having affirmed the right of the Board to make such orders.

But, the fear of the majority may well be realized, for the Board, in balancing the conflicting legitimate interests of employees and employers must examine each case on its own merits and rest its decision on a substantial quantum of the evidence. In the light of these circumstances, it may well be called upon to consider many state laws and to consider the problem of judicial restraints sought by employers, as posed above. How much more simple it would have been for the Board to declare that

²⁴ *N.L.R.B. v. Gullett Gin Co.*, 340 U. S., 361, 95 L. Ed. 337.

activities of employers in seeking the collateral benefits of unemployment compensation were not protected activities. After all, an employee can seldom, except in the peculiar circumstances submitted by this case, be discriminated against for seeking such benefits unless it be with respect to discrimination in hiring, and the likelihood of such discrimination is improbable. The dilemma posed to the striking employees in this case is faced weekly, during the winter season, by construction workers — to take one day's work and give up one week's benefits. The remedy rests with the State legislature. It is not for the Board to compel the payment of full wages or, in the alternative, full unemployment compensation benefits. This is a matter of State law.

Based on the cases cited herein, we can reach no conclusion other than that the Board erred in law in finding that some economic loss or hardship must be suffered by employers *before* they have any legitimate interests, in conflict with those of their employees and requiring a balance in these circumstances. Should our conclusion in this respect be in error, we must conclude, in the light of such cases, that the Board erred in law in failing to find that the respondents do have a direct and substantial interest in unemployment compensation funds, which, if impaired might result in serious loss directly as concerns the depletion of their individual accounts and increased rate of contribution; indirectly as concerns the depletion of the general fund with a potential increase in general contribution levels; indirectly as concerns the depletion of public funds in which they have an interest; and, in-

directly insofar as it would permit recipients to prolong the labor dispute with continued direct economic loss in the form of resulting decreased business.

We conclude that the Board erred in its interpretation of the evidence and failed to base its conclusions on the very substantial evidence in the record that respondents had sufficient interest in the legitimate ends of the course of conduct undertaken by their employees, to permit self help of the type exercised.

We submit that the activity of the employees in seeking unemployment compensation under the facts involved in this cause is not an activity protected by the Act²⁵ and that therefore, the Board has failed to sustain the burden of proof incumbent upon it under the principles of *N. L. R. B. v. Whittin Machine Works*.²⁶

IV. THE ASSERTED VIOLATIONS OF SECTION 8(a)(3):

Encouragement Toward Or Discouragement From Union Membership Cannot Reasonably Be Inferred As A Natural Consequence Of The Employer Conduct Cited.

Not all discrimination in employment and not all manipulation of the tenure, terms or conditions of employment are unfair labor practices under Section 8(a)(3) of the Act. The discrimination or manipulation must in fact relate to the employer-employee relationship and must encourage or discourage membership in a labor organiza-

²⁵ *International Union, UAW v. Wise, E.R.B.*, 336 U.S., 245, 93 L. Ed. 651.

N.L.R.B. v. Jones Laughlin Steel Co., 300 U.S., 1, 81 L. Ed. 893.

²⁶ Ante, n. 7.

tion. The principles pertaining to the application of Section 8(a)(3) are set forth in detail in *Gaynor News Company v. N. L. R. B.*, 347 U.S. 17, 98 L. Ed. 455,²⁷ and *N. L. R. B. v. J. I. Case Co. Bettendorf Works*, 198 F 2d, 919 (CA8).²⁸

27 39: " . . . But the scope of the 'membership in any labor organization' is in issue here. Subject to limitations, we have held that phrase to include discrimination to discourage participation in union activities as well as to discourage adhesion to union membership."

40: " . . . Thus §§ 8(a) (3) and 8(b) (2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood . . . "

* * * * *

42-43: " . . . Thus this section [8(a) (3)] does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

43: "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both § 8(a) (3) and its predecessor. In the first case to reach the Court under the *National Labor Relations Act*, *N.L.R.B. v. Jones & L. Steel Corp.*, 301 U.S. 1, 81 L. ed. 893, 57 S Ct 615, 108 ALR 1352, in which we upheld the constitutionality of § 8(3), we said with respect to limitations placed upon employers' right to discharge by that section that 'the [employer's] true purpose is the subject of investigation with full opportunity to show the facts.' In another case the same day we found the employer's 'real motive' to be decisive and stated that 'the Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees.' Courts of Appeals have uniformly applied this criteria, and writers in the field of labor law emphasize the importance of the employer's motivation to a finding of vio-

lation of this section. Moreover, the National Labor Relations Board in its annual reports regularly reiterates this requirement in its discussion of § 8 (a) (3) . . . ”

44-45: “But it is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a) (3) . . . Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct . . . Thus an employer’s protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established. . . . ”

* * * * *

46: “ . . . In holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is discouragement or encouragement of membership in such union, the court merely recognized a fact of common experience—that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. . . . ”

* * * * *

48-49: “ . . . An administrative agency with power after hearings to determine on the evidence in adversary proceedings whether violations of statutory commands have occurred may infer within the limits of the inquiry from the proven facts such conclusions as reasonably may be based upon the facts proven. . . . ”

* * * * *

51: “Encouragement and discouragement are ‘subtle things’ requiring ‘a high degree of introspective perception.’ . . . But, as noted above, it is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action. Moreover, the Act does not require that the employees discriminated against be the ones encouraged for

purposes of violations of § 8(a) (3). Nor does the Act require that this change in employees' 'quantum of desire' to join a union have immediate manifestations."

* * * * *

56: " . . . In many cases a conclusion by the Board that the employer's acts are likely to help or hurt a union will be so compelling that a further and separate finding characterizing the employer's state of mind would be an unnecessary and fictive formality. . . . "

56: "Of course, there will be cases in which the circumstances under which the employer acted serve to rebut any inference that might be drawn from his acts of alleged discrimination standing alone. . . . "

28 921: "The test which must be applied to the situation is one which we have only recently emphasized—'There can be no violation of (section 8(a) (3)) unless the conduct complained of can have the proximate and predictable effect of encouraging or discouraging membership in a labor organization.' *N.L.R.B. v. Webb Const. Co.*, 8 Cir., 196 F. 2d 702, 706. And that proximate and predictable effect, as a basis for a finding of violation, must have at least some evidentiary foundation in probative circumstances or testimony. Cf. *N.L.R.B. v. International Brotherhood*, 8 Cir., 196 F. 2d 1. It must be kept in mind that what is now being considered is not a question of the latitude of judgment which the Board may exercise in remedy for a particular violation but whether there exists any basis for a finding of a particular violation as a fact. Not much evidentiary basis, to be sure, is required for a Board's finding, but there must at least be something on which an inference can be said to be rationally predicated, in a consideration of the record as a whole."

922: "We do not believe that the mere discharge of a union member, which happens to be wrongful on some other ground under the Act but which has been made without the existence or any reasonable implication of a union basis or motive, is entitled, without more, to be found to constitute a violation of section 8(a) (3). Some color of setting or special circumstance, we think, must ordinarily exist in the particular situation which reasonably gives the discharge a union and not a mere general connotation and which is likely to have a curbing union effect. . . . "

In this case, it is our opinion that the Board has made a bald conclusion, unsupported by any positive evidence in the record, or any reasonable inference from any evidence in the record that:

“Thus we hold on the facts of this case that Respondents’ action in locking out their recalled employees on April 20, 1957, was a manipulation of tenure and terms of employment which infringed upon the collective bargaining rights of these employees and tended to discourage support of the Union and concerted activity for mutual aid or protection in violation of Section 8(a)(3) . . . of the Act. Where, as here, the discrimination had the natural tendency to discourage union membership or activity, specific evidence of anti-union animus and intent to cause such discouragement is not a prerequisite to finding a Section 8(a)(3) violation, as Respondents contend. This is nothing more than an application of the familiar common law rule which holds a man accountable for the foreseeable consequences of his own conduct.” (R. 86).

We fail to understand how cutting off unemployment compensation benefits can make a good, bad or indifferent union member or raise or lower the threshold of an employee’s desire to become or to refrain from becoming a union member, even though a union has advocated the solicitation of such benefits. It may be reasonably inferable that were a union to supply free legal counsel in the procurement of such benefits, for its individual members, that such a lure would entice membership. But there is no such evidence here; and, were such the case would protests to claims prosecuted by such counsel encourage withdrawal from the union?

It is not apparent to us that the action of respondents

in this instance may be characterized as inherently encouraging or discouraging to membership. To say that the ordinarily reasonable and prudent man could foresee that his efforts in cutting off unemployment compensation might encourage or discourage union membership carries the principle of proximate cause beyond the bounds of its normal elasticity. Again, it might be said in *retrospect*, that had these respondents taken no action to interfere with their employee's claims, through self help, legal recourse or otherwise, and simply have permitted their payment, there might have occurred a tremendous surge of membership thereafter. But, they did not so refrain, and we must examine their affirmative conduct.

The long, and currently extant, course of dealing between these respondents and the union representing their employees (R. 29-30, 39-40) militates against any motive or desire on the part of these respondents to discourage membership in the Retail Clerks Union.

We cannot, by any stretch of logic, reasonably conclude from the evidence on hand that the proximate and predictable effect of the respondents' action in this case would be an encouragement or discouragement of union membership. Certainly, had the respondents procured an injunction against payment, had they just left their employees idle, without recall, they might have discouraged union membership far more than it is conceivable they did in this instance. Sixteen dollars per week is better than nothing.

We submit that in the light of the tests set out in the

Bettendorf Works case and *Radio Operations* cases,²⁹ the Board erred both in law and in finding that a substantial quantum of evidence supported a violation of Section 8(a)(3) of the Act in this instance.

CONCLUSION

It is respectfully submitted that the Court should decline to issue any decree enforcing any portion of the Board's order.

HOWARD C. BURTON,

Attorney-At-Law,
504 Strain Building,
Great Falls, Montana,
Attorney for Respondents.

January, 1960

²⁹ Ante, n. 27, 28.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), are as follows:

PREVENTION OF UNFAIR LABOR PRACTICES Sec. 10 (e).

* * * * *

The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.

* * * * *

No. 16571✓

United States
Court of Appeals
for the Ninth Circuit

LOUIE MILLER,

Appellant,

vs.

ARTHUR S. FLEMING, Secretary of Health,
Education and Welfare,

Appellee.

Transcript of Record

FILED

OCT 12 1959

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Southern District of California
Central Division

No. 16571

United States
Court of Appeals
for the Ninth Circuit

LOUIE MILLER,

Appellant,

vs.

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Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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600 Federal Building,
Los Angeles 12, California.

In the United States District Court for the Southern
District of California, Central Division

No. 1174-58-BH

LOUIE MILER,

Plaintiff,

vs.

ARTHUR S. FLEMING, Secretary of Health,
Education and Welfare, *

Defendant.

PETITION FOR REVIEW OF
ADMINISTRATIVE ORDER

To the Honorable Judges of the United States
District Court for the Southern District of
California, Central Division:

The petition of Louie Miller respectfully shows
to the Court as follows:

1. This petition is filed to review an order of the Appeals Council of the Department of Health, Education and Welfare, Social Security Administration. Jurisdiction is conferred by virtue of §405(g) Title 42, United States Code (§205(g) of the Social Security Act, as amended). The final decision of the Secretary of the Department of Health, Education and Welfare was made on October 17, 1958, and notice of such decision was mailed to Petitioner on said date. Petitioner is a resident of the City of Los Angeles, County of Los

Angeles, State of California, and does reside within this judicial district. [2*]

2. On April 9, 1957, Petitioner filed an application for old age insurance benefits with the Department of Health, Education and Welfare, Social Security Administration. On May 24, 1957, it was determined that Petitioner was not entitled to old age insurance benefits for which he applied. A copy of said ruling is attached hereto, marked Exhibit "A" and incorporated herein.

Petitioner appealed this determination. The appeal was heard before a referee in bankruptcy of the Old Age and Survivors Insurance, Social Security Administration Department of Health, Education and Welfare. Petitioner appeared and participated in said hearing before the said referee on March 26, 1958.

On May 5, 1958, the referee's decision was made and entered that Petitioner is not entitled to the old age benefits, for which Petitioner made application. The referee held that Petitioner's income from the City of Los Angeles during 1955 and 1956 for work as a consultant was earned in an employer-employee relationship and did not constitute earnings from self-employment for which Petitioner could be credited with quarters of coverage within the meaning of the Social Security Act, as amended.

A copy of the referee's decision is attached

*Page numbering appearing at foot of page of original Certified Transcript of Record.

hereto, marked Exhibit "B," and incorporated herein.

A request for review of the referee's decision was filed July 1, 1958. On October 17, 1958, petitioner's request for review of the referee's decision was denied by the Office of Appeals Council, Social Security Administration, Department of Health, Education and Welfare. A copy of the said denial of request for review is attached hereto as Exhibit "C," and incorporated herein. Petitioner's request for review having been denied, the referee's decision stands as the final administrative decision on Petitioner's claim. [3]

3. Petitioner requests review of the administrative order determining that Petitioner is not entitled to old age insurance benefits.

Wherefore, Petitioner prays that the decision and order of the Office of Appeals Council, Social Security Administration Department of Health, Education and Welfare denying Petitioner old age insurance benefits, for which Petitioner has made application be set aside and annulled and that this Court find, upon review, that Petitioner is eligible to receive old age insurance benefits, for which Petitioner has made application and for such other and further relief as to the Court may seem just and proper.

HILL, FARRER & BURRILL,

By /s/ RAY L. JOHNSON, JR.,

Attorneys for Petitioner. [4]

EXHIBIT A

Always give Claim No. 554-50-7961-A when writing about your claim.

Department of
Health, Education, and Welfare
Social Security Administration
Bureau of Old-Age and Survivors Insurance
Area Office, San Francisco, Calif.
District Office, 836 S. Figueroa St., Los Angeles
17, Calif.

May 24, 1957.

Louie Miller
280 S. Burlington Ave.
Los Angeles 57, Calif.

This notice refers to your claim for benefits under Title II of the Social Security Act. Our records show that you are not now entitled to old-age insurance benefits.

The Social Security Act provides for payment of old-age insurance benefits to a person who is fully insured. To be fully insured you must have 6 quarters of coverage. A quarter of coverage is a calendar quarter in which the person has been paid \$50 or more in wages. After 1954 if the wages are for agricultural labor, a quarter of coverage is credited for each \$100 in cash wages paid in a calendar year. After 1950, a quarter of coverage may be earned by self-employed persons whose self-employment income in a taxable year is at

least \$400. No more than 4 quarters of coverage may be credited in a calendar year.

Our records show that you have 0 quarters of coverage. When you have the necessary quarters for an insured status, you may again file application for benefits.

If you do not agree with this determination, you may request us to reconsider your claim or you may request a hearing before a referee of the Social Security Administration. Additional evidence is not required, but if new evidence is available it should be submitted with your request for reconsideration or hearing. A request for a reconsideration or a hearing should be made promptly, and must be filed within 6 months from the date of this notice.

If you have any questions about your claim, you should get in touch with the Social Security Administration district office shown above. If you call in person, please give this notice to the district office representative.

/s/ JOSEPH C. COLUMBUS,
Chief, Area Office. [5]

Amounts for 1955 and 1956 could not be included because these amounts were earned in an employer-employee relationship. Such amounts cannot be counted toward your social security.

A report will be forwarded to the district director of internal revenue with whom you filed your tax return, so that refund of self-employment taxes paid on these amounts may be made to the extent permitted by the Internal Revenue Code. [6]

EXHIBIT B

Form AC-514

Department of
Health, Education, and Welfare
Social Security Administration
Office of Appeals Council

REFEREE'S DECISION

In the case of
LOUIE MILLER,
Claimant,
LOUIE MILLER,
Wage Earner.

(Social Security Account number: 554-50-7961.)

Case No. LA-1552

Claim for Old-Age Insurance Benefits

This case is before the referee on request of claimant, Louie Miller, for a hearing appealing a determination by the Bureau of Old-Age and Survivors Insurance, Social Security Administration, Department of Health, Education and Welfare, that he is not entitled to old-age insurance benefits for which he applied. A hearing at which claimant appeared and participated in was held in Glendale, California, on March 26, 1958.

On April 9, 1957, claimant filed an application for old-age insurance benefits alleging that he had self-employment income derived from work per-

formed as a consultant to the City of Los Angeles, California, during 1955 and 1956. In reaching its determination the Bureau found that claimant's income from the City of Los Angeles during 1955 and 1956 for his work as a consultant was earned in an employer-employee relationship and did not constitute earnings from self-employment for which he could be credited with quarters of coverage within the meaning of the Social Security Act, as amended (herein called the Act).

The general issue in this case is whether claimant has the necessary quarters of coverage for a fully insured status entitling him to old-age insurance benefits. The resolution of that issue depends upon whether claimant's income for the performance of his work as a consultant to the City of Los Angeles constitutes earnings from self-employment or represents wages received as an employee of the city within the meaning of the Act. If said income is found not to be earnings from self-employment, then it is income from non-covered employment and claimant lacks the necessary quarters of coverage which would entitle him to old-age insurance benefits. [7]

With respect to income from self-employment, section 211(a) of the Act, in pertinent part, provides that the term "net earnings from self-employment" means the gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed which are attributable to such trade or business.

Section 211(c) further defines the term "trade or business" when used with reference to self-employment income or net earnings from self-employment as excluding the performance of services by an individual as an employee. Section 210(k) (2) of the Act defines an employee as anyone who has the status of an employee under the common law rules applicable in determining the employer-employee relationship.

The record shows that claimant, who was born on February 20, 1885, had been employed by the Bureau of Street Maintenance of the City of Los Angeles (herein called the Bureau) for a period of approximately fifty years prior to March, 1955. During the latter part of his employment he had been the director of the Bureau, which was charged with the maintenance, repair, and clearance of the streets of the city, and had supervised its activities and personnel. As director of the Bureau he was also required to make a large number of inspection trips throughout the city. At the end of February, 1955, claimant was "retired" under the City Employees Retirement Plan¹ because he had attained

¹The charter of the City of Los Angeles which sets forth the conditions for retirement in section 508 also specifically provides:

No person who shall have been retired from the services and employment of the City of Los Angeles pursuant to the provisions of this article shall thereafter be paid for any services rendered as an officer or employee of said city except for services rendered as an election officer or as an officer elected by the electors of said city.

the compulsory retirement age and he was replaced by a new director who had previously been his assistant.

On February 23, 1955, claimant entered into a personal service contract (which appears to have been properly authorized) with the City of Los Angeles whereby he was engaged as a consultant to the city for the period commencing with the date of the contract and terminating on June 20, 1956. The contract provided, *inter alia*:

The city hereby contracts with the contractor for, and contractor agrees to furnish, investigations as to lot cleaning, street repairs, equipment selection and use, and any other matters which may be determined and specified by the Board of Public Works of the city, and to give his expert advice and written reports thereon to the Board of Public Works of the city as herein provided. [8]

In addition, the contract also provided that claimant was to be paid the sum of \$6400 in four equal installments of \$1600 every four months upon the submission to, and approval by, certain members of the Board of Public Works, of reports detailing the services performed during the period. He was also required to insure the city against claims which might arise from the use of his automobile on city business and to itemize his travel expenses by automobile on field trips for which he was to be reimbursed by the city.

Claimant testified that in his capacity as consultant, he was required to consult with city officials such as councilmen, etc., whereas previously he had consulted only with members of the Board of Public Works, who in turn consulted with said city officials, that he also continued to consult with the Board of Public Works as did his successor, that he was no longer responsible for the operations of the Bureau and was not concerned with supervising its activities or personnel except when consulted, that he was subject to assignments by the Board of Public Works to inspect specific jobs involving street repairs and related matters and to make recommendations therein, and that to this extent his duties were an integral part of the Bureau.

Claimant testified further, that although he was free to undertake and perform work for the public, he had devoted himself exclusively to his position as consultant to the city during the term of the contract, working four days per week from 9 a.m. to 3:30 p.m., that he had no expenses in the performance of his duties, that the city provided him with desk space in an office, other than he had previously occupied, and supplied him with telephone service, stationery, secretarial services, and automobile parking space, all of which had been previously furnished to him when employed as the director of the Bureau, that he had no private telephone listing or business cards, and that he did not advertise or secure listings in trade journals

or magazines for the purpose of obtaining work in addition to that secured by him from the city.

The record also reveals that claimant was to perform the services personally, that he did not have helpers, that he was permitted to work for others, that his work was done on city premises, that the city did not require him to work during fixed hours or at certain times, that he was not given instructions about the way the work was to be done, that he was not required to produce a certain amount of work regularly, and that the city had first call on his services.

Claimant completed his work pursuant to his contract with the city and was compensated in accordance with its provisions. Since that time he has not engaged in any gainful activities. In filing his income tax reports for 1955 and 1956 claimant reported his income for his consulting work to the city as self-employed earnings. [9]

After carefully reviewing all the evidence, the referee finds claimant was engaged as an employee by the City of Los Angeles within the meaning of the Act during the period in issue. It is apparent that he was engaged to continue working for the city because of his intimate knowledge of the procedures and operations of the Bureau and the Board of Public Works, rather than because of his general knowledge as a professional consultant who seeks work as an independent contractor. His new work involved the same subject matter on which

he had previously worked and included substantially the same duties. Although he was relieved of his supervisory duties for the Bureau, he nevertheless, indirectly participated in these duties by frequently consulting with his successor concerning them. Also his new duty involving consultations with city officials, other than and in addition to those with whom he had previously consulted, was not substantially different from his former work. It, in effect, served to relieve members of the Board of Public Works from performing this task as they had previously done after being briefed by claimant.

The city furnished all the facilities necessary for the performance of his work except for an automobile for the use of which he was reimbursed by the city. He was required to perform his services personally and did not have helpers. He was subject to assignments by the Board of Public Works to inspect specific jobs and to report his recommendations. The city had first call on his services but, apparently, would not object if he worked for others as long as it did not interfere with his city work. He worked practically full time for the city and did not hold himself out as available to perform services for others, nor did he seek such work. Although it appears that he was not supervised in the performance of his work and that his working time was not regulated, he, nevertheless, was required to report periodically to the Board of Public Works and to obtain its approval of his services performed before becoming entitled to compensation. This in-

dicates that the city retained a substantial measure of control over his services. Moreover, his long experience and proficiency on the job could readily account for the unregulated manner in which he was permitted to perform his work.

Thus, it appears that this is not the type of case in which an individual is engaged in the independent business of rendering advisory consultant services from time to time on a subject-to-call basis, or that the work which he was regularly called upon to perform was of a nature which would require the services of one usually engaged in an independent calling or profession. It appears rather that his services were in a real sense integrated in the work of the city and constituted a definite part of the work of the Bureau and the Board of Public Works, which are charged with the responsibility to maintain and repair the city streets. It further appears that the work performed by claimant [10] could have been handled by a regular employee of the city. Although a considerable amount of experience and ability was necessary in the performance of his services, it was no greater than previously required of him. To a large extent his activities appear to have promoted the interests of the city in much the same manner as his services prior to "retirement." Furthermore, claimant's compensation did not depend upon the completion of a specified amount of work or the accomplishment of a prescribed result. He was paid a fixed amount like any

other employee, with no opportunity to make a profit or suffer a loss under his arrangement.

The fact that the city charter forbid the re-employment of retired employees as employees does not, per se, establish a relationship of an independent contractor if, in fact, the relationship between claimant and the city was one of employer and employee within the meaning of the Act. Thus, in *Matcovich vs. Anglin*, 134 F. 2d 834 (C.A.9), the court held that a local law (California Unemployment Reserves Act) which stated that a dance hall proprietor who employed taxi dancers was not their "employer" and a state court decision to the same effect, were not controlling in determining whether the proprietor was an "employer" within the meaning of the Social Security Act, and that the status of the dance hall proprietor as an "employer" was to be determined under applicable common-law principles.

The referee, therefore, finds that notwithstanding the city's charter provisions and claimant's designation in the contract as a contractor, the entire factual circumstances indicate that his services were those of an "employee" within the meaning of section 210(k) (2) of the Act, and concludes that claimant was an employee of the city within the meaning of the Act, engaged in non-covered employment which did not qualify him to be credited with any of the claimed quarters of coverage.

Accordingly, it is the decision of the referee that claimant is not entitled to the old-age insurance benefits for which he made application.

Date: May 5, 1958.

/s/ WILLIAM W. KAPPELL,
Referee. [11]

EXHIBIT C

Form AC-518

Department of
Health, Education, and Welfare
Social Security Administration
Office of Appeals Council

DENIAL OF REQUEST FOR REVIEW

In the case of

LOUIE MILLER,

Claimant,

LOUIE MILLER,

Wage Earner.

Social Security Acc't. No. 554-50-7961

Case No. LA-1552

Claim for Old-Age Insurance Benefits

Decision of Referee William W. Kapell

Dated May 5, 1958

This case is before the Appeals Council upon request of the claimant for review of the referee's

decision rendered in the captioned case. After careful examination of this matter, we are of the opinion that a formal review of the referee's decision would result in no advantage to the claimant; therefore, the Request for Review is hereby denied.

Dated: October 17, 1958.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman.

Duly verified.

[Endorsed]: Filed December 16, 1958. [12]

[Title of District Court and Cause.]

ANSWER

The defendant, Arthur S. Flemming, Secretary of Health, Education, and Welfare, for answer to the Complaint herein designated "Petition for Review of Administrative Order," admits, denies, and alleges as follows:

I.

The defendant admits the allegations of Paragraph I of the Complaint, except that he states that Section 205(g) of the Social Security Act, 42 U.S.C.A. 405(g), provides for bringing an action to review a final decision of the defendant, which defendant states was in this case a decision rendered on May 5, 1958, by a referee in the Office of Appeals Council, Social Security Administration, in

the Department of Health, Education, and Welfare, which became the defendant's final decision upon denial by said Appeals Council, on October 17, 1958, of the plaintiff's request for a review of such decision. [14]

II.

The defendant admits the allegations of Paragraph 2 of the Complaint, including the unnumbered subparagraphs thereof, except that defendant states that the hearing referred to therein was held by, and the decision of May 5, 1958, was rendered by, a referee of the Office of Appeals Council in the Social Security Administration, Department of Health, Education, and Welfare, and not by a "referee in bankruptcy" as alleged by the plaintiff.

III.

Answering the allegations of Paragraph 3 of the Complaint, the defendant states that said paragraph consists of only a request for review by this court, and therefore, needs no answer.

IV.

Further answering, the defendant states that the plaintiff has no claim upon which relief can be granted, as is shown by the pertinent provisions of the Social Security Act, as amended; by the Regulations of the Social Security Administration promulgated thereunder; by the Transcript of Record upon which the decision complained of was made; and by the findings and conclusions of the defendant therein.

V.

Further answering, the defendant states that the findings of fact made by the defendant are supported by substantial evidence and thus are conclusive under the Social Security Act, as amended.

VI.

In accordance with the provisions of Section 205(g) of the Social Security Act as amended, 42 U.S.C.A., 405(g), the defendant files herewith as part of this Answer a certified copy of the Transcript of Record, including the evidence upon which the findings and decision complained of are based.

Wherefore, the defendant prays for a judgment dismissing the Complaint with costs and disbursements, and for a judgment [15] affirming the decision complained of, in accordance with Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. 405(g).

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JOHN T. ALLEN,
Attorney, Civil Division, Department of Justice,
Attorneys for Defendant.

Certificate of Service by Mail attached.

[Endorsed]: Filed April 1, 1959. [16]

In the United States District Court, Southern
District of California, Central Division

No. 1174-58—BH

LOUIE MILLER,

Plaintiff,

vs.

ARTHUR S. FLEMING, Secretary of Health,
Education and Welfare,

Defendant.

ORDER AND JUDGMENT
OF AFFIRMANCE

Plaintiff brings this petition under 42 U.S.C. §405(g) to review the final decision of defendant rendered upon the denial by the Appeals Council of Social Security Administration on October 17, 1958, to review the referee's decision of May 5, 1958, which determined that plaintiff was not entitled to old age insurance benefits under Title II of the Social Security Act. Upon a review of the pleadings and transcript of the record, it is my view that the findings of fact are supported by substantial evidence and therefore conclusive. This court is not concerned with any subterfuge of the City of Los Angeles to avoid the provisions of the City Charter. The decision of defendant that plaintiff's income from the City of Los Angeles during 1955 and 1956, for his work as a consultant, was earned in an employer-employee relationship and did not constitute earnings from self-employment for which he could

be credited [115] with quarters of coverage within the meaning of the Social Security Act should be and is hereby affirmed. Inasmuch as I heard the case on its merits, it is unnecessary for me to pass upon the motion for summary judgment and said motion is therefore denied. Costs taxed, \$20.00.

Dated: This 26th day of May, 1959.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed May 26, 1959.

Entered May 27, 1959. [116]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATE COURT OF APPEALS FOR THE
NINTH CIRCUIT

Notice is hereby given that Louie Miller, plaintiff-appellant in the above cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order and Judgment of this Court entered on May 27, 1959, affirming the order of the defendant-appellee, denying plaintiff-appellant old age insurance benefits under Title II of the Social Security Act.

HILL, FARRER & BURRILL,

By /s/ RAY L. JOHNSON, JR.,
Attorneys for Plaintiff-
Appellant.

[Endorsed]: Filed July 8, 1959. [117]

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case; and that said items are the originals unless otherwise shown on this list:

Names and Addresses of Attorneys.

Petition for Review of Administrative Order, filed 12/16/58.

Answer of Defendant, filed 4/1/59.

Certified copy of transcript of record of proceedings had before Office of Appeals Council, Social Security Administration, etc.

Order and Judgment of Affirmance, entered 5/27/59.

Notice of Appeal, filed 7/8/59.

Designation of contents of record on appeal, filed 7/8/59.

Certificate of Service re appeal papers, filed 7/8/59.

Dated: August 6, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ WM. A. WHITE,
Deputy Clerk.

In the United States Court of Appeals
For the Ninth Circuit

No. 16571

LOUIE MILLER,

Appellant,

vs.

ARTHUR S. FLEMING, Secretary of Health,
Education and Welfare,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

1. Appellant was an independent contractor and not an employee as a matter of law.
2. Appellant was an independent contractor and not an employee as a matter of fact.
3. The decision of Appellee is not supported by substantial evidence on the record as a whole.

HILL, FARRER & BURRILL,

By /s/ RAY L. JOHNSON, JR.,
Attorneys for Appellant.

Certificate of Service by Mail attached.

[Endorsed]: Filed August 17, 1959.

[Endorsed]: No. 16571. United States Court of Appeals for the Ninth Circuit. Louie Miller, Appellant, vs. Arthur S. Fleming, Secretary of Health, Education and Welfare, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 7, 1959.

Docketed: August 12, 1959.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

No. 16571

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIE MILLER,

Plaintiff and Appellant,

vs.

ARTHUR S. FLEMMING, Secretary of Health, Education
and Welfare,

Defendant and Appellee.

On Appeal From an Order of the United States District Court
for the Southern District of California, Central Division,
Denying Plaintiff-Appellant Old Age Insurance Benefits.

BRIEF FOR APPELLANT.

HILL, FARRER & BURRILL,

By RAY L. JOHNSON, JR.,

411 West Fifth Street,

Los Angeles 13, California,

Attorneys for Appellant.

FILED

NOV 18 1959

PAUL P. O'BRIEN, CLERK

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No. 16571

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIE MILLER,

Plaintiff and Appellant,

vs.

ARTHUR S. FLEMMING, Secretary of Health, Education
and Welfare,

Defendant and Appellee.

On Appeal From an Order of the United States District Court
for the Southern District of California, Central Division,
Denying Plaintiff-Appellant Old Age Insurance Benefits.

BRIEF FOR APPELLANT.

Jurisdiction.

This Court has jurisdiction of this appeal by virtue of authority of Section 405(g), Title 42, United States Code (Section 205(g) of the Social Security Act, as amended) and by virtue of the authority of Section 1292, Title 28, United States Code, which authorizes appeals from all final orders and judgments of the United States District Court.

Statement of the Case.

This is a petition for review of an administrative order of the Appeals Council of the Department of Health, Education and Welfare, Social Security Administration, denying Appellant old age benefits under Title II of the Social Security Act.

On April 9, 1957, Appellant filed an application for old age insurance benefits with the Department of Health, Education and Welfare, Social Security Administration. A final decision of the Secretary of the Department of Health, Education and Welfare was made on October 17, 1958, denying Appellant old age insurance benefits on the ground that Appellant was an employee of the City of Los Angeles and not self-employed.

On December 16, 1958, Appellant requested review in the United States District Court of the administrative order determining that Appellant is not entitled to old age insurance benefits. On May 27, 1959, the United States District Court, Southern District of California, Central Division, made and entered its order and judgment affirming the order of Defendant-Appellee denying Appellant old age insurance benefits.

On July 8, 1959, notice of appeal was filed from the order and judgment of the United States District Court entered on May 27, 1959.

Statement of Questions Presented.

Is the question as to whether Appellant was an employee of the City of Los Angeles or self-employed one of law or fact?

Was Appellant an employee of the City of Los Angeles, or self-employed, as a matter of law?

Was Appellant an employee of the City of Los Angeles, or self-employed, as a matter of fact?

Is the decision of Defendant-Appellee supported by substantial evidence on the record considered as a whole?

The Decision of Appellee That Appellant Was an Employee Is Erroneous as a Matter of Law, and Is Not Supported by Substantial Evidence on the Record as a Whole.

Before considering the scope of this Court's review and the important factors that determine an independent contractor relationship, it is well to remind the Court that it is the policy of the Social Security Act to liberally construe the provisions of the Act in favor of those seeking its benefits. *Carroll v. Social Security Board*, 128 F. 2d 876. The purpose of the old age benefits of the Social Security Act is to provide funds for decent support of elderly people who have ceased to labor and doubts should be resolved in favor of coverage rather than exclusion. *Ewing v. McLean*, 189 F. 2d 887; *Willard v. Hobby*, 134 Fed. Supp. 66. In view of the federally declared policy in favor of coverage under the Act and against exclusion, it is the duty of the court to give a liberal construction to the provisions of the Act in favor of Appellant, who seeks its benefits.

Since the decision of the United States Supreme Court in *Universal Camera Corp. v. N. L. R. B.*, 340 U. S. 474, the Federal Courts are no longer simply a "rubber stamp" insofar as review of an administrative decision is concerned. In the *Universal Camera* case, the court noted that the phrase "substantial evidence" lent itself to the notion that it was enough that the evidence supporting an administrative decision was "substantial" when considered by itself. The court condemned such limited review and held that a reviewing court should not sustain an administrative decision based on evidence which, when viewed in isolation, substantiated the agency's findings. The Supreme Court referred to Congressional criticism

of so contracted a reviewing power in the courts and stated that protests against "shocking injustices" and "judicial abdication" stimulated pressures for legislative relief. The Supreme Court quoted legislative history wherein committee reports of both Houses of Congress referred to the practice of agencies to rely upon suspicion, surmise, implications or plainly incredible evidence and indicated that courts are to exact higher standards "in the exercise of their independent judgment and on consideration of the whole record." *Universal Camera Corp., supra*, 340 U. S. 484.

Since the decision in the *Universal Camera* case, *supra*, a reviewing court, in ascertaining whether there is "substantial evidence" to support an agency determination, must find a preponderance of the evidence in support of the agency's determination. Justice Frankfurter added that:

"A reviewing court is not barred from setting aside a Board decision when it can not conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of the evidence opposed to the Board's view."

Justice Frankfurter concluded by stating that the Administrative Procedure Act directs that courts must now assume more responsibility for the reasonableness and fairness of agency decisions than some courts have shown in the past.

"Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional, judicial function. Congress has imposed upon them responsibility for assuring that the Board keeps with-

in reasonable grounds. . . . That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed on the record as a whole.”

In the light of the *Universal Camera* case, it is the duty of this Court, therefore, to consider the record as a whole in determining whether the agency’s decision that Appellant was an employee is supported by the weight of the evidence. See also *Goldman v. Folsom*, 246 F. 2d 776 (reversing the Secretary’s finding that a person is not entitled to benefits since the finding was not supported by the record considered as a whole); *Shields v. Folsom*, 153 Fed. Supp. 733 (The court must assume responsibility for the reasonableness and fairness of the agency decision considering the record as a whole.)

Whether an individual is an employee or an independent contractor is an issue of law and the rule that a finding of fact, if supported by substantial evidence is conclusive, is not applicable. *Carroll v. Social Security Board*, 128 F. 2d 876, 881; *Social Security Board v. Nierotko*, 327 U. S. 358, 368, 369. This is particularly true where there is a written contract of employment and the facts are not in dispute. In such a situation, the question is one of law for the court. *Albaugh v. Moss Construction Company*, 125 Cal. App. 2d 126 (Where an employment contract has been reduced to writing, the relationship of the parties must be determined therefrom and its interpretation is one of law); *Bemis v. People*, 109 Cal. App. 2d 253 (If there is no conflict in the facts, the question becomes one of law); *Perkins v. Blouth*, 163 Cal. 782 (Where there is no conflict in the evidence, the Court must decide, as a matter of law,

what the facts prove); accord *Robinson v. George*, 16 Cal. 2d 238; *Hedge v. Williams*, 131 Cal. 455; *Batt v. San Diego Sun*, 21 Cal. App. 2d 429.

An independent contractor is one "who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." California Labor Code §3353. In reviewing decisions involving an independent contractor relationship, the California Supreme Court has not hesitated to set aside a finding where it is not supported by substantial evidence. In *Mantonya v. Bratlie*, 33 Cal. 2d 120, the California Supreme Court said at 127-129:

"There is no evidence of any substantiality which could support a finding that the firm which graded defendants' field, or the firm's employe, was an employe of defendants. Of course, where there is any real conflict in the evidence the finding of the trier of fact is conclusive. But the trier of fact is not entitled, arbitrarily or upon mere caprice, to disregard uncontradicted, entirely probable testimony of unimpeached witnesses. Adapting the language of *Perquica v. Industrial Acc. Com.* (1947), 29 Cal. 2d 857, 859 [179 P. 2d 812], to the present situation, 'Generally speaking, it is a question of fact to be determined by the [trier of fact], from the evidence adduced, whether the essential employer-employee relationship exists (*Riskin v. Industrial Acc. Com.*, 23 Cal. 2d 248, 255 [144 P. 2d 16]), and the finding on that issue will not be disturbed where it is supported by substantial evidence. (*S. A. Gerrard Co. v. Industrial Acc. Com.*, 17 Cal. 2d 411, 414 [110 P. 2d 377].) But 'if from all the facts

only a single inference and one conclusion may be drawn, whether one be an employee or an independent contractor is a question of law.' (*Baugh v. Rogers*, 24 Cal. 2d 200, 206 [148 P. 2d 633, 152 A. L. R. 1043]; *Yucaipa Farmers etc. Assn. v. Industrial Acc. Com.*, 55 Cal. App. 2d 234, 238 [130 P. 2d 146]; see also *Burlingham v. Gray*, 22 Cal. 2d 87, 100 [137 P. 2d 9].) Here any reasonable view of the evidence on the issue of [the contracting firm's] status compels the conclusion that [defendants] met their burden of proving that [the firm] was an independent contractor (Lab. Code, §5707 (a)), and that the [jury's verdict, possibly] based on a contrary finding is not sustainable. [Citations.]”

Probably the people most surprised by Appellee's decision that Appellant was an employee were the parties to the employment contract themselves, namely, Appellant and the members of the Los Angeles City Council. The determination that Appellant, *who could not be an employee of the City of Los Angeles, by city ordinance*, and who was employed under a contract drawn up by the Los Angeles City Attorney and unanimously approved by resolution of the Los Angeles City Council as an independent contractor, was an employee shocks the senses of any one familiar with the situation.

All of the *important* factors which go into a determination of the independent contractor relationship support the contention of appellant that he was an independent contractor and not an employee of the City of Los Angeles.

The most important factor is the right to control the manner and means of accomplishing the results de-

sired. In *Empire Star Mines Co. v. California Employment Commission*, 28 Cal. 2d 33, 43, it is said:

“In determining whether one who performed services for another is an employee or an independent contractor, *the most important factor is the right to control the manner and means of accomplishing the results desired*. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. *Strong evidence in support of an employment relationship is the right to discharge at will, without cause.*” (Emphasis added.)

Accord:

Walder v. Industrial Accident Commission, 85 Cal. App. 2d 473.

Appellant contends that the evidence on the record, as a whole, shows that the City of Los Angeles did not have the right to control the manner and means of accomplishing the results desired under the contract; in fact, the very nature of the contract between appellant and the City of Los Angeles was such that the City could not control the manner and means of accomplishing the result. Appellant was employed, because of his extensive experience, to investigate conditions relating to street maintenance in Los Angeles in all of its related aspects and make reports and recommendations to the Bureau of Public Works and the City Council. The nature of the work to be performed precluded the City from exercising control over the manner and means of accomplishing the result desired. *Public officials could not direct or control appellant as to the contents of his*

reports or what his recommendations should be, since the City was paying for appellant's reports and recommendations, not their own.

An analysis of the record will show that the Secretary's decision has no factual or legal support. An ordinance of the City of Los Angeles provided that all city employees must be retired at 70 and that no person who is retired shall thereafter be paid for any services rendered as an employee of the City. It was impossible, therefore, for appellant to be employed as an employee of the City. Having a need for appellant's extensive skills and experience, the City Council created the position of consultant, and entered into a contract with appellant as an independent contractor. Appellant's duties were to investigate conditions with regard to street maintenance and its related aspects and make reports and recommendations to high city officials. Under the contract, Appellant's compensation was not dependent on the amount and kind of work done. Appellant was not carried on the city payroll, as are all employees of the City; he was paid under the contract once every four months rather than twice a month as are city employees; the money to pay appellant was taken from a special appropriation by the City Council. The Secretary ignores the City Ordinance on the authority of *Matcovich v. Anglim*, 134 F. 2d 834. We submit that this decision of the Ninth Circuit Court has been modified somewhat by the decision of the Ninth Circuit Court in *Folsom v. Pearsall*, 245 F. 2d 562, where the Secretary was reversed when he failed to follow California law. We believe also that the *Matcovich* decision is not controlling for the further reason that in the instant case a written contract of employment was entered into between ap-

pellant and the City of Los Angeles which was intended to, and did, comply with the city ordinance, forbidding the employment of appellant as an employee of the City. There is in this case more than simply a State law or State decision, as was the situation in the *Matcovich* case. We have a resolution of the Los Angeles City Council employing appellant as an independent contractor [R. T. 87]. The City Council authorized the Bureau of City Works to enter into a contract with appellant as an independent contractor [R. T. 87]. The contract of employment established an independent contractor relationship. In this situation, the Secretary is not free to ignore the resolution of the City Council approved by the Mayor and the contract of employment between the City and appellant approved by the City Attorney on the ground that the proceedings were a sham and subterfuge designed to evade and circumvent the City Ordinance. (See Appellee's Brief filed in the District Court, pages 26, 28). To the contrary, it must be presumed that the Mayor of Los Angeles, the City Council and the City Attorney followed the law and did not engage appellant as an employee, since they could not legally do so.

We pause at this point to ask the Court to consider this question on the record before it: Would the City of Los Angeles be liable to third persons under the doctrine of *respondeat superior* for the negligence of appellant in carrying out the terms of his contract? The City would be liable to third persons if appellant was an employee but not liable if appellant was an independent contractor. It is inconceivable that anyone could successfully hold the City liable for the acts of appellant in performing under the contract.

Appellant contends that the following evidence clearly supports a determination that he was a self-employed independent contractor:

1. A city ordinance forbade the City Council from employing appellant as an employee.

2. Having need for appellant's extensive skills and experience, the City Council, by resolution, approved by the Mayor, created the position of consultant.

3. The City Council entered into a contract with appellant, approved by the City Attorney, as an independent contractor.

4. In the contract appellant is designated as an independent contractor.

5. The parties believed that they were creating an independent contractor relationship.

6. Appellant's duties were to investigate conditions with regard to street maintenance and its related aspects and make reports and recommendations to high city officials—a type of employment which did not permit the City to control the manner or means of accomplishing the results contracted for.

7. The contract and testimony show that the City could not, and did not, control the means of accomplishing the results. (The Referee's decision admits that appellant was not supervised in the performance of his work and that this working time was not regulated.)

8. Appellant relinquished all of his former duties as Director of the Bureau of Street Maintenance [R. T. 25].

9. His contract required him to do work which he had not done before, that is, to consult and make recom-

mendations directly to the City Council and officials at City Hall [R. T. 26].

10. His offices were removed from the Bureau of Street Maintenance to the offices of the Bureau of Public Works [R. T. 25].

11. Appellant gave up all of his supervisory duties in connection with the Bureau of Street Maintenance [R. T. 23, 26].

12. No one had ever been employed by the City Council as an *employee* of the City to perform the work called for under appellant's contract [R. T. 27].

13. Appellant was free to work for others, if he desired [R. T. 29].

14. Investigations, reports and recommendations to the Bureau of Public Works and City Council was not work done by the Bureau of Street Maintenance prior to appellant's retirement; this type of work was handled through the Bureau of Construction [R. T. 30].

15. Appellant worked with the Bureau of Public Works as an independent consultant and was left to his own discretion as to what he did and hours worked [R. T. 30-31].

16. He was furnished no regular secretary and no private office by the City [R. T. 31-32].

17. Upon the termination of the contract, the City Council wanted to enter into a new contract for his services as consultant but appellant preferred to retire [R. T. 32-33].

18. Appellant's compensation was not dependent on the amount or kind of work which was done; he was paid a specified sum for a specified result [R. T. 33].

19. He furnished his own automobile and insured the City gainst liability caused by acts of appellant in performing the contract [R. T. 33 and Contract of Employment].

20. All reports and memorandums were signed as consultant [R. T. 34].

21. Appellant had no one that he reported to as his boss [R. T. 36].

22. He was not on the city payroll as are all employees of the City [R. T. 36].

23. Appellant was paid every four months rather than twice a month as city employees are paid [R. T. 36].

24. Money for his compensation and automobile expense came from a special appropriation of the City Council [R. T. 37].

25. Appellant's tax returns reported the income as self-employment income as consultant to the City of Los Angeles [R. T. 40].

26. No withholding tax was paid on compensation received by appellant [R. T. 40].

27. A review of the list of activities performed by appellant under the contract as set out at Reporter's Transcript, page 68, *et seq.* of the transcript shows that the work is the type that a consultant and independent contractor would perform.

28. The employment relationship questionnaire, prepared by the City of Los Angeles, at Reporter's Transcript, pages 88 through 91, showed the understanding of the City as to the relationship established between appellant and the City as follows:

(a) Appellant was permitted to work for others [R. T. 88];

(b) He held himself out to the public as available as a consultant [R. T. 89];

(c) He was engaged for particular jobs [R. T. 89];

(d) He had no fixed hours [R. T. 89];

(e) He was not required to follow a daily or weekly routine or schedule [R. T. 89];

(f) *Appellant was not given instructions about the way the work was to be done* [R. T. 89];

(g) *The City could not change the methods used by appellant in doing the work or otherwise direct him as to how to do the work* [R. T. 89];

(h) Appellant was not required to produce a certain amount of work regularly if his services with the City were to continue [R. T. 89-90];

(i) Appellant was paid by contract and not on a salary or hourly wage basis [R. T. 90];

(j) Appellant was not eligible for bonus, sick pay, vacations, etc., like other employees of the City [R. T. 990];

(k) No workmen's compensation insurance was carried by City on appellant [R. T. 90];

(l) *The City could not discharge appellant, and appellant could not quit until the contract was performed* [R. T. 90];

(m) *Appellant worked as an independent contractor and not as an employee* [R. T. 90];

(n) Appellant's earnings were reported as self-employment income [R. T. 90];

(o) Social Security Taxes were not deducted from the amounts paid appellant [R. T. 90];

(p) Appellant only worked part time [R. T. 91];

(q) The contract terms were never changed [R. T. 91];

29. Appellant's answers to the employment relationship questionnaire, found at Reporter's Transcript pages 92 through 95, contain virtually the same answers as the answers filed by the City to appellee's questionnaire; appellant adds that liability would have been incurred if the contract was broken [R. T. 94] and that his services rendered under the contract were completely different from the services rendered previously [R. T. 94].

A recitation of the foregoing evidence would seem to show that the finding of the appellee is against the weight and preponderance of the evidence. Appellee justifies the decision under the doctrine of "conflict of evidence," but this doctrine can be maintained only where the alleged conflict rests upon evidence which so materially contradicts the testimony on the other side or is so inconsistent with it as to leave room in a fair and reasonable mind to find the fact either way.

Appellee completely ignored the most important single fact in the case, namely, the written contract of employment. Counsel for appellee acknowledges this when he said at page 28 of his brief filed in the District Court that "it means little that a written contract had been executed." The contract of employment and the entire relationship between appellant and the City of Los Angeles, as expressed in the resolution of the City Council, authorizing the employment of appellant, as an independent contractor, is disregarded by appellee on the ground that it is a "subterfuge" (appellee's brief p. 15), "concealment" (appellee's brief p. 16), a "cover up" agreement (appellee's brief p. 16), "concealment of the true relationship is the controlling factor" (appellee's

brief p. 26), it was a "family arrangement" (appellee's brief p. 28), and a "circumvention" of the ordinance by the City (appellee's brief p. 28). This inference and conclusion goes to the heart of the case and is wholly unwarranted by the record and is not binding on this Court. To the contrary, the presumption is that the city officials were following the law and carrying out their official duties.

The appellee goes to great lengths to show that appellant was performing similar work to that performed by him as an employee of the City, and, therefore, he must still be an employee of the City, notwithstanding the contract of employment and the ordinance. Of course, the fact that appellant had previously been in the employ of the City doing the same type of work does not change the relationship from that of independent contractor to employee. (See *Houghton v. Loma Prieta Lumber Co.*, 152 Cal. 574, 577), where the Court said, in reversing a finding of employee relationship:

"Another circumstance relied on is that Wyman was formerly in the employ of appellant as its foreman and as such foreman did work for appellant on other roads; but surely that fact could in no way effect the *contractual relations* between said parties as to the building of the road in question."

Conclusion.

The Secretary has discredited and/or ignored the most important evidence in this case going to the heart of the relationship between Appellant and the City of Los Angeles, namely, the contract of employment and the City ordinance. Where there is a state statute, a written contract of employment, no dispute as to the facts, and the

question involves construction of a statutory definition of "employee" under the Act, the question is one of law for the Court. As a matter of law, this Court should find that Appellant was not an employee of the City of Los Angeles. Assuming, however, that the issue is a mixed question of law and fact, Appellee's decision is not supported by substantial evidence on the record considered as a whole.

Respectfully submitted,

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No. 16571

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

LOUIE MILLER,

Plaintiff and Appellant,

vs.

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION and WELFARE,

Defendant and Appellee.

BRIEF FOR APPELLEE.

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No. 16571

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIE MILLER,

Plaintiff and Appellant,

vs.

ARTHUR S. FLEMMING, SECRETARY OF HEALTH, EDUCATION and WELFARE,

Defendant and Appellee.

BRIEF FOR APPELLEE.

I.

Jurisdiction.

The Appellant, Louie Miller, commenced his action against the Appellee, Arthur S. Flemming, Secretary of Health, Education and Welfare, in the United States District Court for the Southern District of California, Central Division, designated Civil Action No. 1174-58BH, on December 16, 1958.

Appellant's action involved a claim for old-age insurance benefits under the Social Security Act and was brought in the said United States District Court pursuant to and by authority of the provisions of Section 405(g), Title 42, United States Code [Section 205(g) of the Social Security Act, as amended].

The United States Court of Appeals for the Ninth Circuit has jurisdiction to review the judgment for the Appellee given in said action pursuant to and by authority of the provisions of Section 1291 of Title 28, United States Code.

II.

Laws and Regulations Involved.

[The Appellant has conceded, both in the trial court and by implication on this appeal, that he has no valid cause of action if the Appellee's decision that he was an employee of the City of Los Angeles, rather than an independent contractor therewith, is entitled to judicial affirmance. Therefore, it is unnecessary to discuss the statutory and regulatory provisions which deny old-age insurance benefits to the Appellant as an employee.]

The Social Security Act, as amended, Section 405(b), Title 42, United States Code:

“(b) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this title. Upon request by any such individual . . . he shall give such applicant . . . reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision. . . . The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this title. In the course of any hearing, investigation, or

other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence.
. . .”.

The Social Security Act, as amended, Section 405 (g), Title 42, United States Code:

“(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, . . . As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. . . . The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions”.

The Social Security Act, as amended, Section 405 (h), Title 42, United States Code:

“(h) The findings and decision of the Secretary after a hearing shall be binding upon all individuals

who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. . . .”.

The Social Security Act, as amended, Section 405 (1)
Title 42, United States Code:

“(1) The Secretary is authorized to delegate to any member, officer, or employee of the Department Health, Education, and Welfare designated by him any of the powers conferred upon him by this section. . . .”.

The Social Security Act, as amended, Section 410(k)
Title 42, United States Code:

“(k) The term ‘employee’ means—

“(2) Any individual who, under the usual commonlaw rules applicable in determining the employer-employee relationship, has the status of an employee;”

The Social Security Act, as amended, Section 418(b),
Title 42, United States Code:

“(b) For the purposes of this Section—

“(3) The term ‘employee’ includes an officer of a State or political subdivision.”

The Charter of the City of Los Angeles, Section 508A:

“A. Every member shall be retired on the first day of the calendar month next succeeding that month in which he shall have reached the age of seventy (70) years . . .”.

The Charter of the City of Los Angeles, Section 508C(2):

“C. . . .

“(2)

“No person who shall have been retired from the service and employment of the City of Los Angeles pursuant to the provisions of this article shall thereafter be paid for any service rendered as an officer or employee of said City, except for service rendered as an election officer, or as an officer elected by the electors of said city”.

Regulations of the Department of Health, Education and Welfare, Section 404.1004(c), 20 CFR Part 404 [1959 Cumulative Supplement, page 207]:

“(c)(1) Every individual is an employee if under the usual common-law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

“(2) Generally such relationship exists when the person for whom services are performed has a right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct and control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other

factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools, and furnishing of a place to work, to the individual who performs the services. In general, if the individual is subject to the control or direction of another merely as the result to be accomplished by the work and as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common-law rules . . .

“(3) When the relationship of employer and employee exists under the usual common-law rules will in doubtful cases be determined upon an examination of the particular facts in each case”.

California Labor Code, Section 3351 (West's Annotated California Codes, 1955 Ed., Vol. 44, page 511):

“3351. ‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes:

. . .

(b) All elected and appointed paid public officers”.

California Labor Code, Section 3353 (West's Annotated Calif. Codes, 1955 Ed., Vol. 44, page 563):

“3353. ‘Independent contractor’ means any person who renders services for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished”.

III.

Summary of Argument.

A.

THE QUESTION WHETHER THE APPELLANT IS AN EMPLOYEE OR AN INDEPENDENT CONTRACTOR IS SUFFICIENTLY FACTUAL TO FALL WITHIN THE RULE THAT FINAL DECISIONS BY THE APPELLEE AS TO ISSUES OF FACT MUST BE JUDICIALLY SUSTAINED IF SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

B.

THE APPELLEE'S DECISION THAT THE APPELLANT WAS AN EMPLOYEE OF THE CITY OF LOS ANGELES, RATHER THAN AN INDEPENDENT CONTRACTOR THEREWITH, IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, AND, THEREFORE, MUST BE AFFIRMED.

C.

EVEN ASSUMING, ARGUENDO, THAT SAID QUESTION IS ESSENTIALLY ONE OF LAW, APPELLEE'S DECISION THAT THE APPELLANT WAS AN EMPLOYEE OF THE CITY OF LOS ANGELES IS LEGALLY SOUND AND, THEREFORE, SHOULD BE AFFIRMED.

IV.

ARGUMENT.

A.

The Question Whether the Appellant Is an Employee or an Independent Contractor Is Sufficiently Factual to Fall Within the Rule That Final Decisions by the Appellee as to Issues of Fact Must Be Judicially Sustained if Supported by Substantial Evidence in the Record.

The question whether the relationship of "master and servant" existed is one of fact for the jury where the evidence is conflicting *or more than one inference can be drawn from the evidence.*

57 C.J.S. Section 617(2), page 409, note 45 and cases cited.

The worker's status as employee or independent contractor is a question of law where the contract claimed to have established the relationship is in writing, where the facts pertaining to the contract and the relationship with the person involved are not in dispute, *and where but one reasonable inference can be drawn therefrom.*

57 C.J.S. Sec. 617(2) pp. 410-411, notes 46, 47, 50, and cases cited.

It is conceded that many cases have said that where the relationship has been formulated in a written contract, which purports to confer the status of independent contractor, the question is usually one of law.

57 C.J.S., Sec. 617(2), pp. 410-411, notes 46, 47, 50 and cases cited;

Batt v. San Diego Sun Publishing Co. (1937),
21 C. A. 2d 429, 69 P. 2d 216;

McReynolds v. Oklahoma Turnpike Authority (S. Ct. Okla. 1955), 291 P. 2d 341;

Stevens v. Frump (1949), 132 W. Va. 66, 52 S. E. 2d 181;

Connolly v. Peoples Gas Light Company (1913), 260 Ill. 162, 102 N. E. 1057.

However, an analysis of these decisions shows that it is only where the circumstances justify a conclusion that the contract embodied the real relationship between the parties, that the foregoing rule applies. This is clearly shown by the language in the *Batt* and *McReynolds* opinions, *supra*.

In *Batt* the court said: "In the instant case the conclusion is inescapable that at the time of the accident in question here Cottrell was performing duties assumed by him under his written contract with appellant and no other. That being so, *and that contract being free from ambiguity and clear in its terms*, the interpretation to be put upon it and the relationship created by it between appellant and Cottrell, becomes one of law alone for decision by a court unhampered by the implied findings of the jury." (emphasis supplied). 21 C. A. 2d 437.

Here, however, we have a contract which is general and vague and which does not purport to set out in detail the specific duties to be performed by the Appellant. [R. T. 84-86].¹ It certainly is not "free from ambiguity and clear in its terms" since it failed to define adequately the conditions of work or the quantity and quality of the investigative reports the Appellant was required to pre-

¹Since Appellant has referred to the transcript of the administrative proceedings by the symbol "R. T.", Appellee will do likewise in the interest of consistency.

pare. Moreover, it is especially significant that the contract herein concerned a person who for 50 years had been an employee of the City of Los Angeles and who in later years had served as Director of the Bureau of Street Maintenance, and that it was executed immediately before his compulsory retirement. [R. T. 22, 24] When all these facets are viewed in light of the prohibition in the City Charter of Los Angeles against payment of any compensation (subject to a few non-relevant exceptions) to a retired employee who continues to work for the city thereafter [R. T. 11-13], it is wholly logical to infer that the primary purpose of this contract was to retain the services of the Appellant as hitherto rendered and that he was designated as a "consultant" therein only because he could not have been paid otherwise.

We do not mean to imply that either the city officials or the Appellant was engaged in any immoral activity. No doubt, all concerned believed that the city would benefit by retaining the services of such an experienced person, and they may even have believed that execution of the contract removed the case from the bar of the Charter. However, it was certainly within the prerogative of the Appellee to weigh these factors and to conclude that, whether or not such an arrangement was valid under the Charter of Los Angeles, the actual relationship between the Appellant and the City continued to be one of employer and employee within the meaning of the Social Security Act.

The *McReynolds* case, *supra*, strongly suggests that under the circumstances here present the Supreme Court of Oklahoma would have ruled that the question was one of fact, despite the existence of a contract. The court stated: "The general rule in this jurisdiction is that

where a contract of employment is in writing the question of the relationship created thereby is one of law for the trial court . . . However, we recognize and apply two further principles, viz.: whether one is an agent, servant or employee depends upon the facts peculiar to each case; and, although under a written contract the question whether the relation of employer and independent contractor ordinarily is a question of law for the court, *a contract which purports to create such relationship will not protect the employer when it may be inferred from facts and circumstances revealed by the evidence that, despite provisions of contract, the real relation was that of master and servant*". (emphasis supplied). 291 P. 2d 345.

The actual holding in the *McReynolds* case was that, despite the existence of a written contract, the question whether the Appellant was an employee or an independent contractor should have been left for the consideration of the jury because of conflicting elements. We submit that it would be difficult to find a case which offers stronger reasons for concluding that the contract was designed to conceal the true relationship between the parties than the one at bar.

Again, it was held in *Arkansas Fuel Oil Company v. Scaletta* (1940), 200 Ark. 645, 140 S. W. 2d 684, that since there was evidence that the "lease contract" was executed as a "cover-up agreement" in order to conceal the true master and servant relationship between the parties to the contract, the question of that relationship was for the jury. Certainly, this seems to be sound law since the mere existence of a contract should not preclude the finder of fact from determining whether it really embodies the actual relationship between the parties.

What is all important here is that Section 508A of the Charter of the City of Los Angeles, which was controlling with respect to the future services of the Appellant, whether as employee or independent contractor, required that he be retired at the age of seventy. [R. T. 11-12]. Said Charter, under Section 508C(2), also specifically provided: "No person who shall have been retired from the service and employment of the City of Los Angeles pursuant to the provisions of this article shall thereafter be paid for any service rendered as an officer or employee of said city, except for service rendered as an election officer or as an officer elected by the electors of said city." [R. T. 13]. Faced with this prohibition, it is very easy to understand why the contract in question was drawn, why it is so general and vague, and why it devotes so little attention to the quantity and quality of the Appellant's services. Presumably, it was understood that he would continue to do virtually the same type of work he had previously performed for so many years. To be sure, he was now called a "consultant" and perhaps he was to circulate more among the various supervisory officials, but essentially, as he himself admitted [R. T. 28], he was doing the same work in the same way. Under these facts, the finding of the Appellee that he was not entitled to benefits should not be reversed.

On page 5 of his brief the Appellant contends that whether an individual is an employee or an independent contractor is an issue of law and that the rule that a finding of fact, if supported by substantial evidence, is conclusive is not applicable.

This contention is unsound, as is shown by the many authorities cited herein and in our trial briefs. Nor do the Appellant's own citations support such a doctrine.

Social Security Board v. Nierotko (1946), 327 U. S. 358, did not concern the question whether the respondent was an employee of an independent contractor but merely whether "back pay" awarded under the National Labor Relations Act should be treated as "wages" under the Social Security Act. The issue was one of statutory definition, and thus clearly and traditionally a question of law. There is nothing in *Nierotko* which conflicts in any way with the rule that ordinarily the question whether a person was an employee or an independent contractor is one of fact.

Carroll v. Social Security Board (7 Cir., 1942), 128 F. 2d 876, is likewise not in point since there again the question was not the status of the plaintiff as an employee or an independent contractor but whether he had an "employer" within the meaning of the Social Security Act. The court stated: "The situation presented, however, is so extraordinary that we doubt if it should or can be solved by the application of rules and theories relative to an ordinary situation. Certainly, it must be conceded that plaintiff was rendering service for someone. That he was not working for himself, and that he was not an independent contractor, we assume would also be conceded". 128 F. 2d 878.

Moreover, the court in the *Carroll* case expressly found that the decision of the Social Security Board that the plaintiff was not an employee was not supported by substantial evidence. The opinion says that: "While the question before us is not free from doubt—in fact, it is extremely close—we are of the opinion that plaintiff was the employee of the bank within the meaning of the Act and entitled to its benefits. In so concluding we have not overlooked the statutory admonition which binds us to

accept the findings of the Social Security Board if supported by substantial evidence. The rule is not controlling, however, because the Board's decision, that plaintiff was not an employee within the terms of the Act, is without substantial support. Moreover, in our view, the rule has no application because the question presents an issue of law rather than of fact. It involves a construction of the Act." 128 F. 2d 881.

Thus, all that the *Carroll* case provides the plaintiff is a *dictum* that under the "extraordinary" facts there present the basic issue was one of law—and since the issue there was quite different from the issue here, this is, indeed, a fragile reed.

Even the California case of *Albaugh v. Morse Construction Co.* (1954), 125 C. A. 2d 126, cited on page 5 of Appellant's brief—which under the decision of this Court in *Matcovich v. Anglim, supra*, would not be controlling in any event—provides little aid to the Appellant. There, the employee-independent contractor question was actually at issue and the court did hold that, under the conditions present, it was a question of law. However, it first found that the contract was clear and unambiguous and that it embodied the true relationship between the parties. 125 C. A. 2d 130-131. As shown herein and in the Appellee's trial briefs, the contract in the instant case fails to meet these qualifications.

The Appellant himself reluctantly recognizes the foregoing distinction in saying: "This [*i.e.*, his contention that the employee-independent contractor question is one of law] is particularly true where there is a written contract of employment and the facts are not in dispute". Appellant's Brief, page 5. Had the Appellant been more accurate in his use of adverbs and said "only" instead of

“particularly,” he would have made a fair statement of the law. This is shown by his own citations, as listed on pages 5-7 of his brief. Where the admitted facts reasonably admit of different conclusions, then the rule invoked by the Appellant certainly does not apply. As shown in the Referee’s decision [R. T. 7-9] and on pages 22 through 24 of our trial Memorandum of Points and Authorities, there are substantial factors in the record which support the theory that the Appellant was an employee.

Appellee does not quarrel with the principle enunciated by the Supreme Court of the United States in *Universal Camera Corp. v. N.L.R.B.* (1951), 340 U. S. 474, that the substantial evidence rule should be applied by weighing the record as a whole. Appellee argued this case upon that basis in the trial court and frankly listed the elements which reasonably could be regarded as supporting the theory that Appellant was an independent contractor. Appellee’s Memorandum of Points and Authorities, pp. 22-24. But even if it be conceded, *arguendo*, that the record contains substantial evidence to that effect, the Appellant cannot prevail. The *Universal Camera* rule certainly does not require that the decision of the administrative agency be supported by a *preponderance* of the evidence but merely by evidence that is substantial when viewed in the light of the entire record. In many cases, of course, there is “substantial evidence” in favor of each of two contrary conclusions. Indeed, that may be the situation here. However, to concede that the Appellant’s position finds substantial support in the evidence in now way avoids the more cogent conclusion that the Appellee’s decision is similarly supported. Therefore, the judgment of the trial court must be affirmed.

The Appellant seems to place great emphasis upon certain California decisions. However, as stated above, the Appellant's own brief shows that these cases merely support the principle that the employee-independent contractor question may become one of law where "from all the facts only a single inference and one conclusion may be drawn". Appellant's Brief pp. 6-7. Moreover, even if we assume, *arguendo*, that Appellant derives tangible support from local adjudications, that would not be conclusive of the question herein. The weight of federal authority holds that the Social Security Act, in order to achieve its national objectives, should be interpreted, whenever reasonably possible, in a uniform way throughout the states. Of course, such a result is possible only by considering the context of the Act as a whole, its legislative history, its basic objectives as revealed by said history, and by applying thereto the generally accepted principles of the common law, unfettered by local peculiarities.

This very Court, in *Matcovich v. Anglim* (9 Cir., 1943) 134 F. 2d 834, interpreted the Social Security Act in the foregoing spirit and held that whether a person is an "employee" within that Act must be determined under the general principles of the common law. The Court found support for this conclusion not only in the language of the Act but in what it conceived to be its broad purpose to "integrate state laws with the federal act and to bring all states into the cooperative venture". It reasoned that since the Act operates within states the governments of which do not participate in its system, it must be given a nationwide interpretation, notwithstanding the congressional intention that the federal and state acts should be closely coterminous. 134 F. 2d 835.

Proceeding from these principles, this Court ruled that a state court's interpretation of the California Unemployment Reserve Act to the effect that the proprietor of a dance hall was not the "employer" of taxi-dancers was not controlling under the Social Security Act. It found in the factual situation enough elements of control by the proprietor over the dancers to justify the district court's decision that he was an "employer" within the meaning of the Act.

On pages 9 and 10 of his brief, Appellant seeks to distinguish the *Matcovich* decision by arguing that "in the instant case a written contract of employment was entered into between appellant and the City of Los Angeles which was intended to, and did, comply with the city ordinance, forbidding the employment of appellant as an employee of the City". However, no such distinction exists. The facts in *Matcovich*, as stated in the opinion of this Court, reveal that after the woman concerned had been licensed as a taxi-dancer by the Chief of Police she and the Appellant therein agreed in *writing* as follows: "This is to certify that is hereby granted the privilege of engaging in dancing with patrons of the undersigned at..... in consideration of the payment to the undersigned of a portion of the money earned by her as mutually agreed upon.

"In granting this privilege, *it is the intent hereof that licensee shall not become an employee of the undersigned and that she shall not become subject to the control of the undersigned.*

"Licensee agrees to abide by all regulations established by the undersigned in the operation of his business". (emphasis supplied.) 134 F. 2d 835.

Despite said contractual assertion, this Court found that the dancer was an “employee” under the Social Security Act.

In other words, in *Matcovich*, as here, there was a written contract which purported to create an independent contractor relationship. Indeed, in some respects the *Matcovich* decision goes further in that the contract therein expressly declared that the “licensee shall not become an employee of the undersigned,” whereas similar language does not appear in the instant contract; and in that the self-interest of the contracting parties in concealing the true relationship between them (avoidance of social security taxes, of dubious benefit to the dancer) was less compelling in *Matcovich* than here, where the interest of both parties was clearly served by adoption of the independent contractor fiction. Here, neither the City nor the Appellant had any reasonable alternative but to invest the Appellant with the cloak of a “contractor” once it was decided that his services should be retained by the City for a year after his compulsory “retirement.”

Nor is Appellant correct in contending that the decision of this Court in *Folsom v. Pearsall* (9 Cir., 1957), 245 F. 2d 562, modified the *Matcovich* doctrine. The two cases have very little in common, as is indicated by the fact that the *Matcovich* case was not even mentioned in the *Pearsall* opinion. We do not believe that this Court is wont to modify or restrict one of its own decisions without even a cursory bow thereto.

In *Pearsall* the basic issue presented was clearly one of law, in the traditional sense. There this Court affirmed a district court decree reversing an administrative decision that the Appellee was not entitled to benefits because she had “remarried,” within the meaning of that term as used

in the Social Security Act. The Court reasoned that statutory construction is a legal function and that courts may examine the construction given by an administrative agency in order to determine its validity or invalidity; that the term "remarried" in the Social Security Act should be interpreted according to the context of the law; and that because said Act does not define that term, its meaning must be determined by state law. 245 F. 2d 565.

That the *Pearsall* problem was quite different from the one herein is clearly shown by the language of the Court:

"Appellant urges that 'remarries' is a term used in a Federal statute, and that its meaning must be interpreted in the context of that law. While we agree, we do not find a definition of 'remarries' in the statute. 'The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true when a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern.' *DeSylva v. Balentine* [1956], 351 U.S. 570, 580, 76 S. Ct. 974, 980, 100 L. Ed. 1415". 245 F. 2d 565.

Accordingly, this Court applied California law and, since it decided that the trial court had correctly applied that law, its decision was affirmed.

Here, however, we are not concerned merely with a question of statutory construction concerning a legal status [marriage] that is precisely defined and invariably committed by federal statutes to local law, but with a highly pragmatic issue, involving the interplay of many economic factors and capable of assuming conflicting

shapes and hues. For these reasons, the federal courts have wisely regarded the employee-independent contractor issue as generally one of fact, or as a mixed question of fact and law, reposing in most instances within the reasonable discretion of the administrative agency concerned.

Moreover, in the instant case, unlike the situation in *Pearsall*, the Social Security Act and the regulations thereunder, as quoted above, clearly base the test for determining whether an applicant is an employee or an independent contractor upon the general principles of the common law, rather than upon the law of the state where the services were performed or any other state. And there certainly is a rapidly expanding body of federal law on this question, not only as applied to the Social Security Act but to many other federal statutes as well.

Presumably, in deciding *Pearsall*, the foregoing distinctions were regarded by this Court as so significant that it deemed even a passing glance at *Matcovich* unnecessary.

Finally, Appellant's assumption that the mere existence of a written contract automatically makes the employee-independent contractor question one of law under California jurisprudence is unsound in any event, as shown by our trial Memorandum of Points and Authorities (pp. 19-21) and by California citations herein. There is nothing unusual today in defining the duties and rights of employees by written contracts. In the year 1959, such a contract certainly does not create any presumption that the person hired was an independent contractor, either under federal or local law. The question remains one of fact, unless the respective rights and obligations of the parties are clearly and thoroughly defined by the contract and unless the contract is consistent with the surrounding circumstances and especially with the actual practices

thereunder, so that it may be regarded as embodying the true relationship.

The judicial approach of this Court in *Matcovich v. Anglim* is in harmony with that subsequently employed by the Supreme Court in *N.L.R.B. v. Hearst Publications, Inc.* [1944], 322 U. S. 111, which involved the term "employee" in the National Labor Relations Act. The Supreme Court reasoned that said meaning should be determined, not exclusively by reference to common-law standards, local law, or legal classifications for other purposes, but "with regard to the history, context and purpose of the Act and the economic facts of a particular relationship." 322 U. S. 128-129. It then held that the decision of the N.L.R.B. that the newsboys involved were "employees" under the Act may not be set aside on review since it was warranted by the record and had a reasonable basis in the law. 322 U. S. 131-132.

Viewed in any light, it certainly seems unreasonable to contend that the mere fact that the parties purport to define a worker's status by a written contract necessarily or even preferably makes that question one of law. If the contract fully covers the relationship between the parties, if it is clear and definite in its terms, if it is consistent with the nature of the services actually rendered and the manner in which they are performed, then, indeed, the question of the worker's status may properly be considered as essentially legal. However, an employment contract frequently contains ambiguities and diverse elements and it is necessary to study and evaluate them in the light of actual performance in order to resolve the question of status properly.

To take a hypothetical case, a particular applicant for benefits under the Social Security Act might be regarded

as an employee if the Secretary felt that factors A, B, C, and D were, in their cumulative effect, more important than factors E, F, G, and H. That, of course, is essentially a decision of fact, based upon what actually happened between the parties as weighed on the scales of the agency's experience and expertise. In such a situation, a reviewing court is not justified in substituting its own evaluation of these factors for that of the administrator. Any attempt to do so violates the substantial evidence rule and the sound public policy which underlies it. Presumably, this was the primary reason why the experienced trial judge who heard this matter affirmed the decision of the Appellee.

On page 14 of his brief the Appellant contends that "the City could not discharge appellant, and appellant could not quit until the contract was performed." In support of this contention the Appellant cites page 90 of the administrative record. Presumably, his reference is to answer 17 of the "Employment Relationship Questionnaire" submitted to the Secretary of the Board of Public Works of the City of Los Angeles, which answer merely stated that the Appellant was "not an employee—worked as independent contractor." Of course, in view of the aforesaid prohibition in the Charter of the City of Los Angeles, such an answer was to be expected and had to be given consistently in order to permit the Appellant to be paid and in order to avoid any admission that the parties were violating the law. In any event, it does not determine whether or not the Appellant could be discharged during the period of the contract.

Indeed, a close reading of the contract indicates that the City might, in effect, have been able to discharge the plaintiff without cause during the year in question. Para-

graph 4 thereof provides that "Payment shall be made to the Contractor only upon the statement of the Contractor, approved in writing by the President or two members of the Board of Public Works". [R. T. 85].

It does not appear from the context of the contract, or from anything else in the record, whether "statement" as used in said paragraph 4 meant the Appellant's quarterly report as required by paragraph 2 [R. T. 67-83], or merely a voucher for services rendered [R. T. 98]. However, approving a voucher is usually a matter of administrative routine, which would scarcely require the intercession of the President of the Board of Public Works or two members thereof; whereas approval of a detailed report listing the Appellant's activities for a given quarter would be a matter for the executive discretion of the Board. Moreover, unless the quarterly reports were required in order to enable the Board to determine whether the Appellant was performing satisfactorily, they would seem to serve no useful purpose. It is clear from the "List of Activities" attached to said reports [R. T. 68-70; 72-77; 79-83] that the Appellant was working in close association with several administrative supervisors of the City and that much of his work was performed at their request. Since he was not acting "on his own," presumably the City did not need the quarterly reports merely to be informed of the general nature of Appellant's services. Consequently, we believe it more logical to interpret paragraph 4 as meaning that the Board of Public Works had to approve the Appellant's quarterly report before he became entitled to compensation.

Proceeding from the foregoing premise, no standards or criteria for approval were imposed to guide the Board on this matter so that apparently it could deny approval for

any reason sufficient unto itself. Perhaps fraudulent or arbitrary action would have been set aside by the courts, but otherwise it seems that in this respect the Board had even more control over Appellant than the ordinary employer. Although an employer often has an unrestricted right to discharge, at least for unsatisfactory performance, he is, nevertheless, generally obligated to pay for the services rendered to that point. Here, however, it appears that had the Board been dissatisfied with the work of the Appellant in any particular quarter, it could have refused to approve his report or "statement" for that period and thus, subject to the legal restrictions presumed above, have denied him compensation. In any event, this was a peculiar and ambiguous provision and one which would rarely be acceptable to a bona fide independent contractor dealing at arm's length.

Moreover, even if it be conceded, *arguendo*, that the City of Los Angeles had no right to discharge the plaintiff during the period of the contract, that does not necessarily create a question of law which must be resolved in the Appellant's favor. Appellant has quoted the following from *Empire Star Mines Co. v. California Employment Commission* (1946), 28 Cal. 2d 33, 43: "Strong evidence in support of an employment relationship is the right to discharge at will, without cause." Appellant's Brief, p. 8. We concede that this is an important factor. However, it is not necessarily decisive. It may be, and often is, overcome by other criteria to the contrary. See *Royal Indemnity Co. v. Industrial Accident Commission* (1930), 104 C. A. 290, 285 Pac. 912; *Peters v. Cal. Bldg.-Loan Assn.* (1931), 116 C. A. 142, 2 P. 2d 439; *Hartford Accident & Indemnity Co. v. Industrial Accident Commission* (1932), 123 C. A. 151, 10 P. 2d 1035.

In the *Peters* case, *supra*, it was said that the right of discharge is not conclusive evidence negating the independence of a person performing work for another. See also *Batt v. San Diego Sun Publishing Company* (1937), 21 C. A. 2d 439, 69 P. 2d 216, where the court stated:

“It is true that the right of immediate discharge usually has been held to indicate the existence of master and servant. But this has not always been true (citing California cases, including those above). It is well settled that the contract must be construed as a whole and that all of its provisions must be considered in giving effect to any one of them”. 21 C. A. 2d 435.

The court in *Peters* proceeded to rule that plaintiff's decedent was an independent contractor despite the fact that he had been subject to discharge by the defendant employer for unsatisfactory work and that the defendant was the sole arbiter of whether sufficient cause existed.

It is submitted that if the right of discharge does not necessarily prevent a finding that the person performing the work is an independent contractor, the reverse should also be true. The mere fact that such a right does not exist during the period covered by a contract should not be sufficient, in itself, to require a holding that the party involved is an independent contractor. It should not be fatal to the existence of an employer-employee relationship that the parties agreed in writing that during a stated period the employee would not be discharged except under certain conditions. Job protection of this type is a frequent result of collective bargaining between the employer and the representative union. Since the courts certainly would not consider that this was decisive in determining the status of a given worker, why should it be decisive, or

even of major significance, in cases where the worker contracted directly?

Section 3351 of the California Labor Code, enacted in 1937, clearly anticipates the existence of written contracts between employer and employee, as distinguished from earlier days when such contracts were a rarity. Said Section states:

“ ‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes: . . . (b) all elected and appointed paid public officers”.

If, as Appellant seems to imply throughout his brief, the mere existence of a written contract between the parties automatically converts the question whether a particular worker was an employee or independent contractor into a question of law, then the purpose of Congress in attempting to achieve national uniformity, through the harmonious policies and rulings of an administrative agency utilizing its vast experience and knowledge in achieving the statutory goals, would be frustrated. Employment contracts, not uncommon today, will become more frequent in the future. The position taken by the Appellant would eventually result in an assumption by the courts of many of the administrative responsibilities of the Department of Health, Education, and Welfare.

It is anticipated that the Appellant may also argue that even if it be assumed that the written contract here is not decisive, yet since the basic facts pertaining thereto are not in dispute, the ultimate question must be one of law. However, this argument is fallacious since the cases

clearly show that the proper test is not whether both parties agreed upon the basic facts but whether those facts lead so compellingly to a definite conclusion, *i.e.*, that the person concerned is an employee or an independent contractor, as the case may be, that any other result would clearly violate the common-law criteria for the determination of this question. See as to this 57 C. J. S., Section 617 (2), page 411, *et seq.*, and especially the cases cited under notes 49 and 50.

Section 3353 of the California Labor Code defines an "independent contractor" as "any person who enters service for a specified recompense for a specified result, under the control of his principal as to the result of his work and not as to the means by which such result is accomplished." Of course, this merely adopts the common-law concept that the measure of potential control is a primary factor, which is conceded by the Appellee but which leaves the major question unanswered. Appellee wishes to emphasize again, however, that the local law of California cannot be regarded as controlling on this question. Moreover, even if it could be considered decisive, it would sustain the Appellee's position in any event. This is clearly evidenced by the citations and discussion which follow.

The Supreme Court of California has said that where there is no conflict in the evidence, it is the duty of the appellate court to decide as a matter of law what the facts prove. *Hedge v. Williams* (1901), 131 Cal. 455, 63 Pac. 721; *Perkins v. Blauth* (1912), 163 Cal. 782, 127 Pac. 50. However, this broad language must be qualified in the light of its more definitive statements both in the earlier case of *Greenberg v. Western Turf Association* (1905), 148 Cal. 126, 82 Pac. 687, wherein it was said that "when none of the facts are controlling the court should refuse

to direct a verdict,” and in the later case of *Robinson v. George* (1940), 16 Cal. 2d 238, 105 P. 2d 914, where it stated that a question of law would be presented *only* “if the terms of the contract are precise and explicit and the evidence is reasonably susceptible of but a single inference.” See also *Chapman v. Edwards* (1933), 133 C. A. 72, 24 P. 2d 211, where the California Court of Appeals observed this distinction by declaring that the question whether a person was an employee or an independent contractor *was a question of fact in all cases except where the evidence permits only one reasonable inference.*

In *Frugoli v. Conway* (1950), 95 C. A. 2d 518, 213 P. 2d 76, it was said that if the facts disclose a mixed relation of employment, whether a person is an independent contractor or an employee, is ordinarily a question of fact. “In such cases,” said the Court, “the findings of the trial court, if based on substantial and competent evidence, cannot be disturbed on review.”

“If there can be only one reasonable inference from the evidence, the question becomes one of law for the Court—but in most cases it is a mixed question of law and fact and the jury’s determination is binding if supported by substantial evidence.”

Graetch v. Dix (1945), 68 C. A. 2d 155, 156 P. 2d 79.

A California decision concerning a factual pattern somewhat similar to the one herein is that of *Burlingham v. Gray* (1943), 22 Cal. 2d 87, 137 P. 2d 9, wherein it was said that it was not conclusive that the employee is permitted to choose his own time with respect to arriving and leaving, and that he was not directed where to go or to whom to sell. As to this see also 28

Op. Cal. Atty. Gen. 362, wherein it was held that a person who had been appointed city attorney, and who had taken the requisite oath, is a public officer and thus an employee for Social Security purposes even though his service was intermittent and purportedly performed on a contractual basis. An analogous result was reached in 56 Op. Cal. Atty. Gen. 258.

Another California decision which sheds light on the instant problem is *Maaskant v. Matsui, et al.* (1942), 50 C. A. 2d 819, 123 P. 2d 853, wherein the following pertinent comment was made by the Court:

“The appellants quote numerous excerpts from the testimony which, they assert, show that Matsui was not an employee but an independent contractor . . . appellants then proceed to quote numerous authorities stating well-settled rules as to the distinction between an employee and an independent contractor. It is not necessary to refer to those because the most casual reading of the record shows that the appellants have omitted to refer to testimony which clearly gave the jury the right to infer that the appellant Matsui was an employee of the appellant Hopper and we are, of course, not concerned here with mere conflicts in the testimony”. 123 P. 2d 854.

Consequently, under local law, which is essentially the general common law on this question, the fact that the Appellant herein did not follow rigid working hours but had considerable freedom with respect to when and how he worked, would not be decisive.

The facts in the instant case do not compel but one conclusion since they contain diverse elements which would permit reasonable men to differ as to the status of the Appellant. Under such circumstances, the question

is clearly one of fact and, therefore, the decision of the Appellee must be approved if supported by substantial evidence, under the mandate of Section 205(g) of the Social Security Act.

From a review of the authorities it is evident that the question whether a person is an employee or an independent contractor is always a question of fact, even where the basic facts are not in dispute and even where there is a written contract, unless the evidence leads so compellingly to one conclusion that the other would clearly violate the controlling rules of law. Only in the latter case would a trial judge be warranted in directing a verdict or an appellate court in reversing the judgment below.

In recent years, the federal courts have shown an increasing tendency to resolve any doubt as to whether a particular issue is one of fact or law in favor of finding it to be a question of fact. In other words, the judicial tendency has been to allow the administrative agency to decide any particular question wherein the given facts would justify contrary inferences and, thus, contrary ultimate conclusions. For example, in *Magner v. Folsom* (D. C. N. Y., 1957) 153 F. Supp. 610, the district court held that the Secretary's decision that the father of the claimant had not been competent to marry was supported by substantial evidence and, therefore, was conclusive upon the court. Since the competency of a person to marry has generally been regarded as a question of law, the *Magner* case indicates a willingness by the federal courts to narrow that concept in Social Security cases.

From our study of the many federal decisions on this problem, we believe it fair to say that where the constituent elements justify contrary inferences, the issue almost invariably will be considered one of fact.

Federal decisions with respect to statutes somewhat analogous to the Social Security Act likewise show the fallacy of Appellant's contention that the question whether a worker is an employee or an independent contractor is usually one of law. For example, in *Railway Express Agency Inc. v. The Railroad Retirement Board* (C. A. 7, 1958), 250 F. 2d 832, cert. den. 356 U. S. 967, it was held that said Board's finding that, for purposes of the Railroad Retirement Act and the Railroad Unemployment Insurance Act, the Agency's merchant agents were not independent contractors but employees was supported by substantial evidence and must be affirmed. In that case the Seventh Circuit Court of Appeals said that to sustain the decision the reviewing authority need not find that the Board's construction of the law was the only reasonable one or even that it was the result which the Court would have reached independently in judicial proceedings. In accord is *Southern Development Co. v. Railroad Retirement Board* (C. A. 8, 1957), 243 F. 2d 351.

To summarize, it is submitted that the relevant factors herein are sufficiently inconsistent or ambiguous to make the question whether the Appellant was an employee or independent contractor a question of fact, so that the Appellee's decision must be sustained if supported by substantial evidence.

B.

The Appellee's Decision That the Appellant Was an Employee of the City of Los Angeles, Rather Than an Independent Contractor Therewith, Is Supported by Substantial Evidence in the Record and, Therefore, Must Be Affirmed.

In the instant case the Appeals Council, on October 17, 1958, made the following decision:

"This case is before the Appeals Council upon request of the claimant for review of the referee's decision rendered in the captioned case. After careful examination of this matter, we are of the opinion that a formal review of the referee's decision would result in no advantage to the claimant; therefore, the Request For Review is hereby denied".

Thus, the Appeals Council adopted and affirmed the decision of the referee that the Appellant was an employee of the City of Los Angeles, and, as such, was not entitled to the benefits claimed under the Social Security Act. Its action became the "final" administrative decision of the Secretary of Health, Education and Welfare, from which an appeal may be taken to this court only under the restrictive provisions of the Social Security Act, Secs. 205(b), (g); 42 U. S. C. A. 405(b), (g).

The record indicates that the requirements of due process were fully satisfied and, indeed, the plaintiff has made no objection on that score.

The essential findings of the referee are as follows:

"* * * the referee finds claimant was engaged as an employee by the City of Los Angeles within the meaning of the Act during the period in issue. It is apparent that he was engaged to continue working for the city because of his intimate knowledge

of the procedures and operations of the Bureau and the Board of Public Works, rather than because of his general knowledge as a professional consultant who seeks work as an independent contractor. His new work involved the same subject matter on which he had previously worked and included substantially the same duties. Although he was relieved of his supervisory duties for the Bureau, he, nevertheless, indirectly participated in these duties by frequently consulting with his successor concerning them. Also his new duty involving consultations with city officials, other than and in addition to those with whom he had previously consulted, was not substantially different from his former work. It, in effect, served to relieve members of the Board of Public Works from performing this task as they had previously done after being briefed by claimant.

“The city furnished all the facilities necessary for the performance of his work except for an automobile for the use of which he was reimbursed by the city. He was required to perform his services personally and did not have helpers. He was subject to assignments by the Board of Public Works to inspect specific jobs and report his recommendations. The city had first call on his services but, apparently, would not object if he worked for others as long as it did not interfere with his city work. He worked practically full time for the city and did not hold himself out as available to perform services for others, nor did he seek such work. Although it appears that he was not supervised in the performance of his work and that his working time was not regulated, he, nevertheless, was required to report periodically to the Board of Public Works and to obtain its ap-

proval of his services performed before becoming entitled to compensation. This indicates that the city retained a substantial measure of control over his services. Moreover, his long experience and proficiency on the job could readily account for the unregulated manner in which he was permitted to perform his work.

“Thus, it appears that this is not the type of case in which an individual is engaged in the independent business of rendering advisory consultant services from time to time on a subject-to-call basis, or that the work which he was regularly called upon to perform was of a nature which would require the services of one usually engaged in an independent calling or profession. It appears rather that his services were in a real sense integrated in the work of the city and constituted a definite part of the work of the Bureau and the Board of Public Works, which are charged with the responsibility to maintain and repair the city streets. It further appears that the work performed by claimant could have been handled by a regular employee of the city. Although a considerable amount of experience and ability was necessary in the performance of his services, it was no greater than previously required of him. To a large extent his activities appear to have promoted the interests of the city in much the same manner as his services prior to ‘retirement’. Furthermore, claimant’s compensation did not depend upon the completion of a specified amount of work or the accomplishment of a prescribed result. He was paid a fixed amount like any other employee, with no opportunity to make a profit or suffer a loss under his arrangement.

The fact that the city charter forbid the re-employment of retired employees as employees does not, *per se*, establish a relationship of an independent contractor if, in fact, the relationship between claimant and the city was one of employer and employee within the meaning of the Act. Thus, in *Matcovich v. Anglim*, 134 F. 2d 834 (C. A. 9), the court held that a local law (California Unemployment Reserves Act) which stated that a dance hall proprietor who employed taxi dancers was not their 'employer' and a state court decision to the same effect, were not controlling in determining whether the proprietor was an 'employer' within the meaning of the Social Security Act, and that the status of the dance hall proprietor as an 'employer' was to be determined under applicable common-law principles.

"The referee, therefore, finds that notwithstanding the city's charter provisions and claimant's designation in the contract as a contractor, the entire factual circumstances indicate that his services were those of an 'employee' within the meaning of section 210(k)(2) of the Act, and concludes that claimant was an employee of the city within the meaning of the Act, engaged in noncovered employment which did not qualify him to be credited with any of the claimed quarters of coverage.

"Accordingly, it is the decision of the referee that claimant is not entitled to the old-age insurance benefits for which he made application". [R. T. 8-9].

The basic issue of fact in this case is whether Appellant has the necessary "quarters of coverage" for a fully insured status entitling him to old-age insurance benefits.

Appellant has conceded that the resolution of this issue depends upon whether the income derived from his work as a "consultant" to the City of Los Angeles constituted earnings from self-employment or represented wages received as an employee of the City, within the meaning of the Social Security Act. If said income is found not to be earnings from self-employment, then it must be income from non-covered employment, so that Appellant would lack the necessary "quarters of coverage" to entitle him to the benefits he has claimed.

On pages 11 through 15 of his brief the Appellant has listed many factors which, he contends, show that he was an independent contractor. Many of these factors are obviously repetitious or inconsequential, and some are not in accord with the evidence. For example, the Appellant argues under item 12 on page 12 of his brief that "No one had ever been employed by the City Council as an employee of the city to perform the work called for under appellant's contract", disregarding the undeniable facts that the contract was signed before the Appellant retired as an employee and that he, himself, admitted that his services under the contract involved, to a large extent, the same duties he had performed hitherto [R. T. 24, 28]; that his work was integrated with the routine work of the Bureau of Street Maintenance and that his duties could have been performed by a regular employee [R. T. 28, 34-35]; and that a study of the actual work performed by the Appellant, as itemized in his quarterly reports, indicates that nearly all of his services involved routine operations which would normally be performed by an employee and not by an expert "consultant", as the Appellant claims to have been [R. T. 67-83; Appellee's trial Supplemental Memorandum of Points and Authorities, 3-5].

A study of these activities reveals on its fact that the Appellant's contention, under item 27 on page 13 of his brief, that "A review of the list of activities performed by appellant under the contract as set out at Reporter's Transcript, page 68, *et seq.* of the transcript shows that the work is the type that a consultant and independent contractor would perform" is simply not true. The functions performed were invariably those which any experienced supervisor of the Bureau of Street Maintenance would ordinarily assume.

Again, the Appellant contends, under item 16 on page 12 of his brief, that "He was furnished no regular secretary and no private office by the City", and he cites pages 31-32 of the record in support of this contention. However, Appellant's testimony on said pages shows that he was furnished office space, although he shared it with others, and that secretarial services were made available to him, although not on an exclusive basis. In other words, Appellant worked under the same conditions as do thousands of governmental employees who, in no sense of the word, can be regarded as independent contractors.

Again, Appellant contends, under item 18 on page 12 of his brief, that his compensation "was not dependent on the amount or kind of work which was done; he was paid a specified sum for a specified result". However, as shown above, the contract seems to have made it a condition of compensation that Appellant's quarterly report be approved by the Board; at least it permits a reasonable inference that, in the absence of such approval, the Appellant's services would have been terminated. Moreover, it is difficult to see how he was paid for a "specified result" when his duties were clearly not defined in detail by the contract or, indeed, by any subsequent directive in the record and when their actual performance showed

a great variety of unrelated functions, almost entirely of a routine nature and devoid of any systematic pattern.

However, even if it be assumed, *arguendo*, that the factors so listed by Appellant constitute "substantial evidence" that he was an independent contractor, it is equally evident that other factors in the record, when weighed together, support a contrary conclusion just as strongly, if not more so. As to this, reference is made to pages 22 through 24 of the Appellee's trial Memorandum of Points and Authorities, whereon the relevant factors, pro and con, are listed in columnar juxtaposition.

The factors which support the decision of the Appellee may be restated as follows:

- (a) The Los Angeles City Charter prohibited the re-hiring of the Appellant as an employee, which under the peculiar circumstances involved herein would justify an inference that the contract was merely a device to circumvent it [R. T. 11-13, 84-86];
- (b) The terms of the contract [R. T. 84-86] favor the employer-employee theory for these reasons:
 - (1) It is a vague and terse document which fails adequately to define the Appellant's duties;
 - (2) Appellant's duties are subject to control by the Board of Public Works since he agreed to furnish investigative reports on "any other matters which may be determined and specified by the Board of Public Works" [R. T. 84];
 - (3) The agreement ran for one year and provided a yearly salary divided into four equal quarterly installments, regardless of the number and type of reports submitted except that at least one report was required for each quarter [R. T. 85];

- (c) Appellant was retiring as an employee but the contract was signed while he was still employed and his services under the contract involved essentially the same duties he had performed hitherto [R. T. 24, 28];
- (d) Appellant was subject to assignment by the Board of Public Works to inspect designated jobs and to report to the Board [R. T. 35];
- (e) The City had first call on Appellant's services. He worked practically full time (4 days a week, from 9 a. m. to 3:30 p. m.) and he did not seek other work [R. T. 31-32, 41];
- (f) Although Appellant was required to report to the Board of Public Works each quarter, his compensation was not dependent upon the quantity or quality of his reports [R. T. 33, 85];
- (g) The City furnished Appellant all facilities, including office and office supplies, except that Appellant provided his own automobile, for which he received a mileage allowance [R. T. 31-33, 85-86];
- (h) Appellant's work was integrated with the routine work of the Bureau of Street Maintenance and his duties could have been performed by regular employee [R. T. 28, 34-35].

No doubt, other elements, pro or con, can be found in the record, but the above are sufficient to indicate that the evidence presented to the referee and the Appeals Council raised a genuine question of fact.

Moreover, the Appellee does not have the burden of proving that a person who seeks a benefit under the Social Security Act is not entitled thereto. That burden

must always be borne by the claimant and it does not shift from him after litigation has commenced. Although the Appellee does not consider himself to be, and does not act as, an adversary of any claimant for benefits under the Act, he cannot allow a claim where the evidence does not affirmatively establish that the prescribed conditions of eligibility have been met. Granting that there is no specific provision of the Act with respect to the burden of proof on employee-or-contractor questions, there is language with respect to other types of claim which expressly places the burden of proof upon the claimant. For example, both Section 216(i)(1) of the Act [42 U. S. C. A. 416(i)(1)] relative to "period of disability", and Section 223(c)(2) [42 U. S. C. A. 423(c)(2)] relative to "disability benefits" state that "An individual shall not be considered to be under a disability unless he furnishes such proof of the existence thereof as may be required".

Moreover, apart from the context of the Act, it is well-settled that, absent clear statutory language to the contrary, the burden rests upon one who files a claim with an administrative agency to establish that the required conditions of eligibility have been met. See *Norment v. Hobby* (N. D. Ala. 1953), 124 F. Supp. 489, and *Thurston v. Hobby* (W. D. Mo. 1955), 133 F. Supp. 205, both of which actions concerned Section 205(g) of the Social Security Act. See also *Eschbach v. Contractors, Pacific Naval Air Bases* (7 Cir. 1950), 181 F. 2d 860; *Ashford v. Appeal Board* (1950), 238 Mich. 428, 43 N. W. 2d 918; and *Department of Industrial Relations of the State of Alabama v. Tomlinson* (1948), 251 Ala. 144, 36 So. 2d 496, in which last case the Alabama Supreme Court held, and cited a number of decisions by courts of other states so holding, that a claimant under a state

unemployment compensation law has the burden of proving his right to benefits, and that "the claimant assumes the risk of non-persuasion".

On the foregoing record, it is submitted that even without the controlling statutory restriction in this case, the general principles of judicial review would require this court to affirm the decision of the Appellee. *A fortiori*, in view of the mandate of Section 205(g) of the Act that the factual findings of the Administrator must be approved if supported by substantial evidence, it would be improper for this Court to substitute its own judgment.

Such a conclusion is especially compelled in this case because of the fact that the Appellant had spent nearly fifty years in the service of the City of Los Angeles and presumably had the most influential "connections". Although the trial judge disclaimed any finding that the contract between Appellant and the City was a subterfuge, or was designed to circumvent the provisions of the charter, certainly he would have been thoroughly justified in viewing the transaction with a skeptical eye, and certainly this Court may conclude that the contract falls far short of telling the whole story.

In further support of Appellee's argument that the contract between the Appellant and the City of Los Angeles did not embody or reflect the real relationship between the parties thereto (see Appellee's Memorandum of Points and Authorities, pages 13-17, 26-28), the Court's attention is respectfully directed to the facts and comment below.

It is a rather remarkable coincidence that the Appellant's imminent retirement coincided so conveniently with the realization of the Board of Public Works that "there has long been a need for improvement of present pro-

cedures in connection with lot cleaning and repair and maintenance of public streets”. [R. T. 87].

The chronology of municipal action reveals that, having received a request from the Board of Public Works for authority to contract with the Appellant in order to meet said alleged need, the Finance Committee of the City Council recommended at the latter’s meeting of February 9, 1955:

“that the board of Public Works be authorized to enter into a contract with Louis Miller, as an independent contractor, for investigating, advising and reporting on new and improved methods of lot cleaning, street repairs, equipment selection and use, and such other subjects as may be specified by said Board, and that the City Attorney be instructed to prepare such contract pursuant to specifications of the Board of Public Works.

“WE FURTHER RECOMMEND that Subject To The Approval of The Mayor, the sum of \$6400 be appropriated from the Unappropriated Balance to the Contractual Services Account, Bureau of Street Maintenance Fund, in payment for the services to be contracted for”.

Said recommendation was unanimously approved by the Council under a suspension of the rules at the same session, *without any discussion whatever*. [Minutes, Los Angeles City Council, Vol. 398, pp. 540-541; we understand there is no available public record of the proceedings before either the Board of Public Works or the Finance Committee of the City Council]. On February 17, the Mayor filed with the City Clerk a letter of concurrence dated February 14, and on the same filing day the City Clerk notified the interested departmental officers. [R. T. 87].

Thereafter, a contract was prepared, presumably by or with the approval of the City Attorney, which was signed by the parties on February 23, to be effective on the day following the plaintiff's compulsory retirement on February 28. [R. T. 24, 84] All this certainly constituted remarkably rapid action by the several municipal agencies involved.

Although the reason advanced by the Board of Public Works for the execution of said contract was a "need for the improvement of present procedures", the Appellant presented no evidence at said hearing, either orally or by documentation, to show that his services under the contract contributed anything to such improvement. The record does not warrant even an inference that he made any substantial proposal for changing the established method of doing things. There is no testimony to this effect in the transcript of hearing. [R. T. 18-41] The appellant's quarterly reports, [R. T. 6-83] are virtually devoid of any entry or comment which suggests that he submitted any recommendation "for the improvement of present procedures". Indeed, the three letters to the Board of Public Works which accompany the reports [R. T. 67, 71, 78] are couched in virtually identical language, and the paragraph therein which discusses the content of the reports is exactly the same in all three letters. Said paragraph reads as follows:

"Attached you will find a list with a brief description of the investigations made at the request of Board members and other public officials with special attention to recommendations relative to the replacing of pavement, construction of storm drains, sewer trenches, water drainage, general street repairs, estimates on proposed projects and projects

contemplated, details on lot cleaning, and consultation preceding and during conferences on various subjects". [R. T. 67, 71, 78].

Surely, recommendations concerning the replacement of pavement, etc., do not concern the "improvement of present procedures" and do not support the Appellant's position that he was primarily an independent consultant. Nearly all of the foregoing is routine maintenance and nothing more.

Finally, reference to the monthly reports themselves shows nothing but routine entries, with one possible exception. Typical of these entries are the following:

"8/23/55 Attended meeting in Commissioner McCann's office regarding Eldridge Avenue N/o Sayre St. [R. T. 69].

11/8/55 Conferred with Superintendent Lauer of Street Maintenance regarding the construction of sidewalks in Erwin Street and Haskell Avenue. [R. T. 72]

12/12/55 Checking complaint regarding drainage, 103rd and Central. [R. T. 74]

3/29/56 Investigated condition of Exposition Boulevard west of Crenshaw Boulevard and conferred with Street Maintenance. [R. T. 80]

6/25/56 Conferred with Judge Marchetti regarding sunken curb in front of his property located at 8428 Carlton Way". [R. T. 83]

The possible exception mentioned above concerns an entry dated 8-24-55 as follows: "Met with C. Beardley, Hugo Winter, and Paul Wright at Shoup Avenue and Frair Street regarding the use of a new select material

for sub-grade". [R. T. 69] This is the only entry found which uses any language to indicate that the Appellant did anything, or proposed anything, which constituted a departure from routine methods. Moreover, the Appellant may be credited with this proposal only by inference since it might have emanated from either of the other two persons mentioned or even from an outside source. This is an exceedingly flimsy peg upon which to hang a conclusion that the Appellant was actually hired as a consultant to recommend improvements in "present procedures".

All things considered, the decision of the Appellee that the Appellant was an employee rather than an independent contractor is amply supported by the evidence in the record and the reasonable inferences therefrom. Therefore, it was properly sustained by the trial court.

C.

Even Assuming, Arguendo, That Said Question Is Essentially One of Law, Appellee's Decision That the Appellant Was an Employee of the City of Los Angeles Is Legally Sound and, Therefore, Should Be Affirmed.

If we make the untenable assumption, merely for the sake of argument, that the question of Appellant's status is one of law, it is submitted that, even so, the decision of the Appellee should be affirmed. It is a debatable question, to be sure, with diverse elements, as listed above, but the overriding factor is that the surrounding circumstances favor a conclusion that the written contract did not embody the real relationship between the parties.

Since the contract was vague and indefinite, recourse must be had to the underlying conditions and to the manner of performance in order to ascertain the true intent

of the parties. These factors have been adequately discussed above and, weighed together, they tilt the scales in favor of the Appellee's decision.

It is especially significant that the contract was signed about five days before the Appellant retired [R. T. 22, 24, 84] and that presumably the negotiations which preceded it were initiated at a much earlier date. No doubt, the Appellant had been a valuable and conscientious municipal employee and the desire of his superiors to retain him is understandable—but that is all the more reason, of course, why this Court, were it to apply its own judgment, should peer behind the facade and survey the actual structure.

It is elementary that mere nomenclature in a contract does not conclusively establish a person's status but that a court must look behind it to the entire context and, where ambiguity exists, to the surrounding circumstances in order to ascertain the true intent of the parties.

The contract here in question provided for an over-all yearly salary of \$6400, payable in four equal installments of \$1600. Although the Appellant was required to submit at least one report each quarter, the contract was silent as to what such reports should contain and how they should be formulated. Moreover, it is uncertain whether such a report had to be approved by the Board of Public Works before the Appellant became entitled to his quarterly payment. The contract merely stated that "payment shall be made to the Contractor only upon the *statement* of the Contractor, approved in writing by the president, or two members, of the Board of Public Works". (emphasis supplied) [R. T. 85] Appellant interprets this ambiguous language as meaning that all he had to do was to submit a voucher, or a mere state-

ment that he had been on the job for the four months and had submitted a detailed report on his activities, as shown by his testimony on page 33 of the administrative record as follows:

“Q. Was your compensation dependent in any way upon amount and kind of work you described in your statements? A. No, it was not because the contract listed there that I was to receive money, and it did not state any addition. The only addition I received was a contract which was also authorized. There was mileage, any mileage that I drove”. [R. T. 33]

As explained above, we consider that a contrary interpretation, to the effect that this provision gave the Board of Public Works the right to discharge the Appellant by refusing to approve his quarterly report, as more logical and as completely consistent with the theory that he was an employee. But for argument's sake, let us accept the Appellant's version.

If the Appellant actually was an independent contractor, this was a very peculiar arrangement. Under his own interpretation, it follows that he was hired to prepare investigative reports but that he was paid without regard for the quantity, quality or form of those reports, on a basis which guaranteed him a stated yearly salary so long as he provided at least one undefined “report” every four months. It may seriously be doubted that the corporation counsel of Los Angeles would ever approve such a vague contract in a normal situation. The only explanation that makes sense under the Appellant's theory is that this was a “family” arrangement by parties who understood and trusted each other for the purpose of continuing a desirable relationship by circumventing certain legal obstacles.

Here it means little that a written contract had been executed. In view of the prohibition of the Charter, some formal designation of the Appellant as a "Contractor" was imperative. It also means little that Appellant was not required to be on duty during specified hours. It was understood, tacitly or otherwise, that he would do enough work to fill the need for his knowledge and experience. Viewing these circumstances in conjunction with the many other factors, as listed and discussed above, which affirmatively support a conclusion that the Appellant was an "employee", it is evident that the decision of the Appellee is legally sound and should be affirmed.

It is also a firmly-established rule that while a conclusion of law by the Secretary of Health, Education, and Welfare is not binding on a district court, it is entitled to great weight because of the agency's specialized knowledge.

Fuller v. Folsom (D. C. Ark. 1957), 155 F. Supp. 348;

acc. *Dunn v. Folsom* (W. D. Ark. 1958), 166 F. Supp. 44;

See also:

Folsom v. Pearsall (C. A. 9, 1957), 245 F. 2d 562, 564.

On page 10 of his brief, the Appellant asks a rhetorical question: "Would the City of Los Angeles be liable to third persons under the doctrine of *respondeat superior* for the negligence of appellant in carrying out the terms of his contract?" And he answers: "It is inconceivable that anyone could successfully hold the City liable for the acts of appellant in performing under the contract".

A better answer to said question is that it is irrelevant, since the local rules which govern the doctrine of *respondeat superior* are certainly not controlling with respect to whether the Appellant was an employee or an independent contractor under the Social Security Act. *Matcovich v. Anglim* (9 Cir. 1943), 134 F. 2d 834. The real question in this case is whether, in view of the context and purposes of the Social Security Act, as illuminated by the administrative rulings and practices thereunder which have been impliedly sanctioned by Congress since the passage of the Act, a finding that the Appellant was an employee is supported by substantial evidence. Whether he was enough of an employee to satisfy the California doctrine of *respondeat superior* is absolutely immaterial.

However, in view of the California decisions which we have cited above, we believe that a strong case can be made under local law for an affirmative answer and that Appellant's contention that it would be "inconceivable" is a gross exaggeration.

Continuing to view, for the sake of argument, the ultimate question herein as one of law, it is clear in any event, from the context of the Social Security Act and the relevant regulations thereunder, and from a great number of judicial decisions, that the general principles of the common law, as interpreted in the federal courts, that is federal common law, rather than local law, must determine whether the Appellant was an employee or an independent contractor.

The Social Security Act, as originally enacted, did not contain a definition of the term "employee". Regulations promulgated by the Internal Revenue Service (then Bureau of Internal Revenue) and the Department of Health,

Education, and Welfare (then the Social Security Board; later the Federal Security Agency), incorporated a test for determining the employer-employee relationship, based upon the usual common-law rules whereunder the right of a person to exercise control over the individual performing services for such person is the primary factor for consideration. Thus, Regulation No. 2 of the Social Security Board, promulgated in 1939, stated in article 3:

“Service as an employee.—The relationship between the person for whom services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an

independent contractor. An individual performing services as an independent contractor is not as to such services an employee”.

This definition has been retained without change in each subsequent revision of the Department's regulation (see Regulations No. 3, section 403.804, 20 CFR, part 403; Regulations No. 4, section 404.1004(c), 20 CFR, part 404).

These regulations have been recognized and upheld repeatedly as stating a proper rule for determining the employer-employee relationship for social security purposes. See *Texas Company v. Higgins* (2 Cir. 1941), 118 F. 2d 636. In *Jones v. Woodson* (10 Cir. 1941), 121 F. 2d 176, the court expressly stated that questions of employment relationships under the Act must be determined on the basis of common-law rules and that the regulations provide a test of such relationships based upon such rules. The court said:

“It must be presumed that Congress was cognizant of these well-established principles at the time of the enactment of the statute, and if different guides were intended for ascertaining whether the relationship of employer and employee existed between parties in the application of the statute, appropriate language would have been used to indicate such purpose. There is nothing in the Act or its legislative history which indicates such an intent. Furthermore, the regulation adverted to blueprints with meticulous care the elements of the relationship in strict harmony with uniform judicial pronouncements. Congress has convened several times since the regulation was promulgated and has not evidenced its disapproval in any manner. That acquiescence must be construed as approval . . .”.

In 1947 the Supreme Court in *United States v. Silk*, 331 U. S. 704, 67 S. Ct. 1463, applied a somewhat different but still a single, federal test for determining the existence of employer-employee relationships, setting forth factors designed to explore the "economic reality" of the relationship between the parties, which include the "control test" in the regulations of the Treasury Department and the instant agency. Thereafter, in 1948 the Congress amended the Social Security Act to define the term "employee" therein for the first time. Under this amendment, included in Public Law 642, 80th Congress, 2d Session, the term "employee" was defined in section 1101(a)(6) of the Act as follows:

"The term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules".

Under the provisions of the Social Security Amendments of 1950, the common-law definition of the term "employee" was placed in section 210(k)(2) of the Act, 42 U. S. C. A. 410(k)(2), which has been quoted and discussed above. The effect of this amendment was considered in *Benson v. Social Security Board* (10 Cir., 1949), 172 F. 2d 682, wherein the court stated with respect to the statutory definition:

"While it is not necessary to explore the full effect of this enactment in the determination of the existence of employer-employee relationships arising in the future, we think it can fairly be said that the intent of Congress was to say that in determin-

ing in a given case whether under the Social Security Act such a relationship exists, the common-law elements of such a relationship, as recognized and applied by the courts generally at the time of passage of the Act, were the standard to be used . . .”.

See also in connection with the statutory definition of the term “employee”, *Party Cab Company v. United States* (7 Cir. 1949), 172 F. 2d 87.

The subsequent amendments to the Social Security Act have left unchanged the definition of the term “employee” as adopted by the 80th Congress in Public Law 642, although the definition was expanded in the Social Security Amendments of 1950 to include within its scope categories of individuals who were not employees under the usual common-law rules.

The federal courts, which have stated that the common-law rules apply under the federal statute, have also repeatedly declared that determinations of the employment relationship for purposes of the Act must be governed by federal standards and not by the rules established in local jurisdictions. The Fifth Circuit, as early as 1943, declared in *American Oil Company v. Fly*, 135 F. 2d 491:

“The Social Security Act operates uniformly throughout the United States, and under like conditions of employment the tax ought to be paid in every State uncontrolled by local decisions as to what relation is created by the contract”.

It is submitted that even if it be assumed that the question whether Appellant was an employee or an independent contractor is one of law, the decision of the Appellee is in accord with the overwhelming weight of federal authority, as shown by numerous citations above, and, therefore, should be sustained by this Court.

V.

Conclusion.

In view of the foregoing principles and precedents, it is respectfully submitted that the judgment of the trial court herein should be affirmed.

DATED: This 7th day of December, 1959.

Respectfully submitted,

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IN THE
United States
Court of Appeals
For the Ninth Circuit

ALBERT LOPEZ GALLEG0,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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IN THE
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APPELLEE'S BRIEF

INTRODUCTION

The Appellee, Plaintiff below, will be designated as the Government. Appellant, Defendant below, will be designated as Appellant herein. Transcript of Proceedings prepared by the Court Reporter will be abbreviated T.P. Transcript of Record prepared by the Clerk of the United States District Court will be designated T.R.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Arizona adjudging Appellant guilty of

an indictment charging Appellant with a violation of Section 176a of Title 21, United States Code, unlawful importation of marihuana.

The jurisdiction of the United States District Court was based upon Section 3231, Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under provisions of Sections 1291 and 1294 of Title 28, United States Code.

STATEMENT OF THE CASE

Appellant was indicted in the United States District Court for the District of Arizona for importing and bringing into the United States approximately 11 ounces of bulk marihuana and approximately 17 marihuana cigarettes in violation of Section 176a, Title 21, United States Code (R.T. 89). He was found guilty after a trial by jury (R.T. 26, 27). He was sentenced as a first offender to the minimum imprisonment of five (5) years prescribed by the Act as amended by the Narcotic Control Act of 1956, effective July 19, 1956 (R.T. 78). The facts relating to the trial errors alleged by Appellant are as follows:

1. *Admission into evidence of the bulk marihuana, Gov. Exh. 1A, and the marihuana cigarettes, Gov. Exh. 1B.* — On April 3, 1959 Immigrant Inspector Percy J. Schugk and Customs Inspector Donald McNab stopped the Appellant as he was entering the United States from Mexico at Naco, Arizona to check his car and person (T.P. 7-10, 45). In the trunk of Appellant's car a paper sack (Gov. Exh. 1A) was found by Inspector Schugk which contained a substance which appeared to be marihuana (T.P. 9). Inspector Schugk handed the sack to Customs Inspector McNab who took same to the home of the Deputy Collector of Customs, Fred Valenzuela, in Naco, Arizona for his inspection (T.P. 49, 50). Both men returned with the sack to

the Customs House. On the arrival at the Customs House located at the Border, of Deputy Collector Valenzuela, the Appellant was personally searched by him and a Prince Albert tobacco can containing what appeared to be marihuana cigarettes was found in his pants pocket (T.P. 77, 78). During the search of Appellant's person the sack (Gov. Exh. 1A) was placed by Deputy Collector Valenzuela in a closed desk in the Customs House for approximately one hour and during this hour the Collector was in the vicinity of the desk at all times (T.P. 90). That same night the sack and can were placed in a safe in the Customs House by Deputy Collector Valenzuela (T.P. 81). The next day Deputy Collector Valenzuela personally took the sack and can to the Commissioner's hearing (T.P. 82-85), after which he replaced them in the safe at the Customs House where they remained until he sent the sack (Gov. Exh. 1A) and the can (Gov. Exh. 1B) by registered mail to the Customs Laboratory in Los Angeles, California (T.P. 82, 83). After the contents of the sack and can were analyzed by Chemist Denzel Curtis in the Laboratory at Los Angeles, they were returned by registered mail to the Deputy Collector at Naco, Arizona (T.P. 102). The safe in which the sack and can were placed had a combination lock. The combination was known by Deputy Collector Valenzuela and the Acting Deputy Collector who takes Mr. Valenzuela's place when he is gone (T.P. 84). At the trial, Inspector Schugk and Deputy Collector Valenzuela testified that the contents of the sack (Gov. Exh. 1A) and the can (Gov. Exh. 1B) were substantially in the same condition as when they were taken from Appellant (T.P. 12 and 78).

2. *Sentence imposed.*—The only facts in the record pertaining to this issue are that the Appellant was sentenced as a first offender to the minimum sentence of five (5) years as prescribed by law (T.R. 78).

ARGUMENT I.

Appellant contends that Government's Exhibits 1A and 1B, the sack of marihuana found in the trunk of his car, and the can of marihuana cigarettes taken from his person, were not properly admitted into evidence because the chain of custody was not complete and exclusive (Appellant's brief, page 3). This claim is not substantiated by the record. The Appellant takes the position that it is incumbent upon the Government to exclude any and every possibility that might have been present for any person to handle the exhibit in question. Specifically the Appellant claims it was incumbent upon the Government to call as a witness the Acting Deputy Collector who knew the combination of the safe where Government's Exhibits 1A and 1B were kept to state that he did not tamper with the exhibits. (Appellant's Brief 5 and 6). The cases cited by the Appellant do not substantiate this position. The rule is certainly not that the Government has to produce as a witness every person who might have touched or handled the exhibits. The Government does have to show that the exhibits were in substantially the same condition as when they were obtained. This exact rule is discussed in *U. S. vs. S. B. Penick and Co.*, 136 F. 2d 413, in which the court citing from the case of *Pennsylvania Railroad Co. vs. Fox and London*, 93 F. 2nd 669, certiorari denied, 304 U. S. 566, and *Hanify Co. vs. Westberg*, 16 F. 2d 552, stated at page 415,

"It is true that before a physical object connected with the commission of a crime can properly be admitted in evidence, there must be a showing that such object is in substantially the same condition as when the crime was committed. 2 Wharton, Criminal Evid, 11th Ed. 757. But there is no hard and fast rule that the prosecution must exclude all possibility that the article may have been tampered with. (Cases cited.) In each case the trial judge

before he admits it in evidence must be satisfied that in reasonable probability the article has not been changed in important respects. Wigmore, Evidence, 3d Ed. 437(1); 32 C.J.S. Evidence, 607). In reaching his conclusion he must be guided by the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. Here the samples were taken in the ordinary course of business for the very purpose of being retained as samples; they were put in the usual place where samples were kept to remove them from accident or meddling and there they remained, so far as appear, undisturbed. We think this showing was sufficient to justify admission in evidence of the bottles and their contents and that it was for the jury to decide how likely it was that some other substance had been substituted for what was originally put in the bottles . . .”

The testimony of the Government’s witnesses show that Exhibits 1A and 1B were in substantially the same condition at the time of the trial as when acquired by the Government officers from the Appellant (T.P. 12, 78). There is no scintilla of evidence that would indicate this is not true. Further, every moment from the time the sack and can were taken from Appellant’s car and person to the time they were introduced in evidence was accounted for in the testimony of the persons who handled them. See Jurisdictional Statement *supra*, page 1.

ARGUMENT II.

The Appellant does not contend that the statute under which Appellant was sentenced was unconstitutional *generally* but contends that in *this specific case* it was in violation of Article 8 of the Constitution of the United States which forbids any cruel and unusual punishment because it deprives the Appellant of the right of parole and probation and good time treatment while

serving his sentence. (Appellant's brief, page 8.) In support of this proposition the Appellant cites *U. S. vs. Rosenberg, et al.* 195 F2 583. The quotes cited by the Appellant from this case are only dicta as they follow the statement by Justice Frank at page 605, "The subsequent paragraphs express only the views of the writer of this opinion." Even in this portion of the opinion, at page 605, Justice Frank states, "No Federal decision seems to have held cruel and unusual any sentence under a statute which itself was constitutional." Prior to this portion of the opinion containing only the views of Justice Frank, the Court states at page 604,

"Unless we are to over-rule sixty years of undeviating federal precedents, we must hold that an appellate court has no power to modify a sentence. 'If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by the statute.' *Gurera v. United States*, 8 Cir., 40 F. 2d 338, 340. Cased cited * * *. In *Blockburger v. United States*, 284 U. S. 299, 305, 52 S. Ct. 180, 182, 76 L. Ed. 306, the Supreme Court said: 'Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but, there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.'"

The Appellant, 24 years of age, was sentenced to the minimum sentence (five years) that could be imposed under the statute 21 U.S.C. 176a of which he was convicted.¹

¹ 21 U.S.C. 176a provides in part that any person convicted of this section shall be imprisoned not less than 5 nor more than 20 years and in addition may be fined not more than \$20,000.00.

The same rule as discussed above in the Rosenberg case is set forth in the case of Brown vs. U.S., 9th Cir. case cited at 222 F. 2d 293 at 298.

The Appellant states in his brief that he is deprived of good time allowance. (Appellant's brief page 8.) We wish to point out that this is erroneous. 26 U.S.C. 7237(d) as amended in 1956 made persons convicted under 21 U.S.C. 176a ineligible for parole under 18 U.S.C. 4202, but not ineligible for good time allowance under 18 U.S.C. 4161.

CONCLUSION

For the reasons stated, we respectfully request that the Court sustain the conviction and judgment entered herein.

Respectfully submitted,

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